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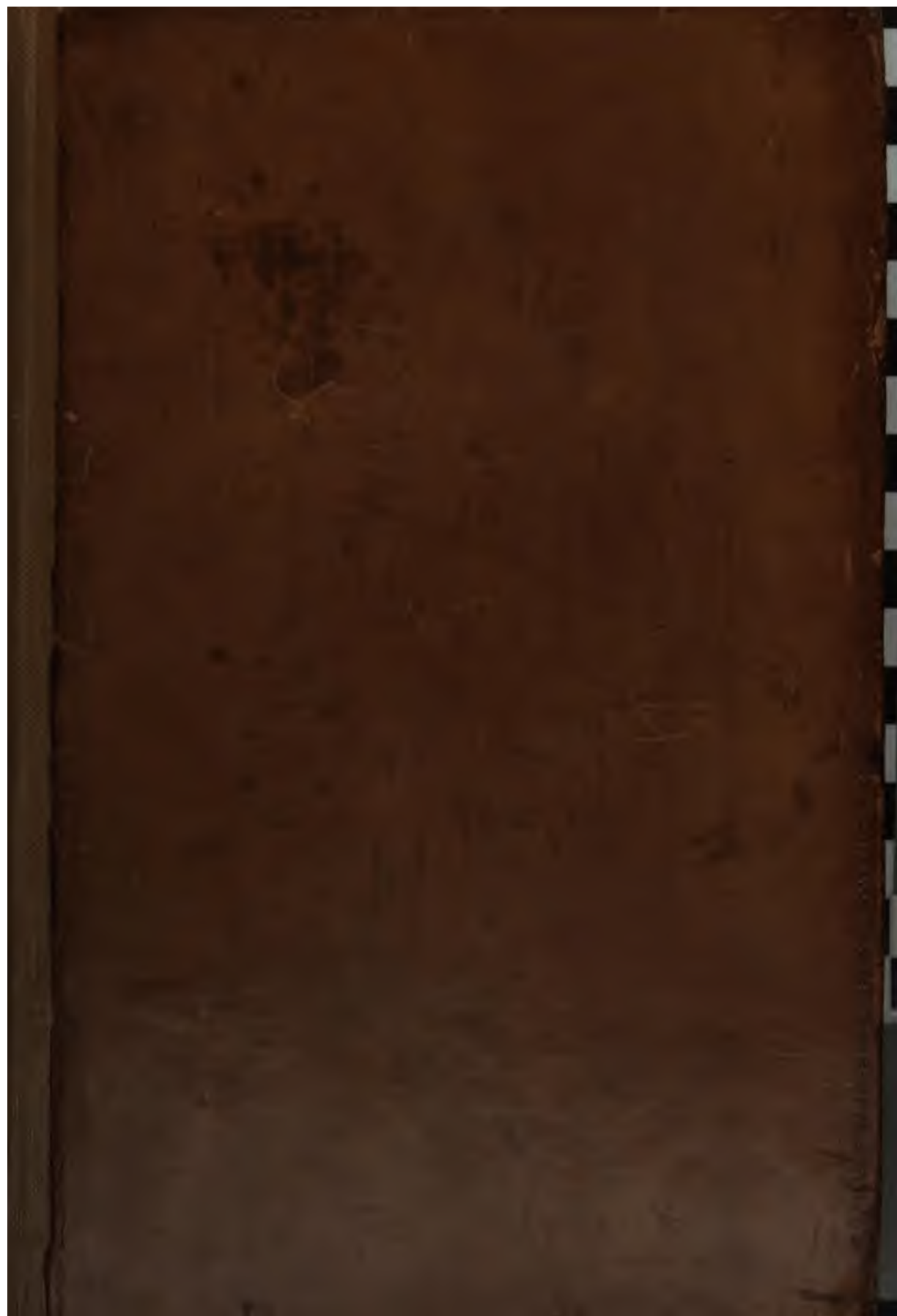
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A
T R E A T I S E
O F T H E
P L E A S O F T H E C R O W N ;
O R ,

A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT
SUBJECT, DIGESTED UNDER PROPER HEADS.

IN TWO BOOKS.

B Y
W I L L I A M H A W K I N S ,
S E R J E A N T A T L A W .

B O O K T H E F I R S T .

T H E S I X T H E D I T I O N ,

In which the Text is carefully collated with the original Work; the marginal References corrected; new References from the modern Reporters added; a Variety of *Manuscript Cases* inserted; and the whole enlarged by an Incorporation of the several Statutes upon Subjects of Criminal Law, to the TWENTY-SEVENTH YEAR OF GEORGE THE THIRD. To which an Explanatory Preface is prefixed, and new and copious Indexes are subjoined.

B Y
T H O M A S L E A C H , E S Q .
O F T H E M I D D L E T E M P L E ,
B A R R I S T E R A T L A W .

L O N D O N :
P R I N T E D B Y H I S M A J E S T Y ' S L A W - P R I N T E R S .

P U B L I S H E D F O R T H E E D I T O R :
A n d s o l d b y T H O M A S W H I E L D O N , B o o k s e l l e r , N o . 4 3 , F l e e t - S t r e e t .
P r i c e O n e P o u n d E i g h t S h i l l i n g s i n B o a r d s .
M , D C C , L X X V I I .



TO
THE RIGHT HONOURABLE
SIR JAMES EYRE, KNIGHT,
LORD CHIEF BARON
OF HIS MAJESTY'S COURT OF EXCHEQUER.

MY LORD,

THE permission to inscribe my humble labours to your Lordship, is a testimony of your Lordship's known disposition to encourage even the appearance of useful industry.

The original Work, as well from the nature of its subject, as from its established merit, seems to possess a natural claim to your Lordship's protection. It regards a system of law, the most serious and important in its consequences to the interests of society; the profound knowledge, and firm, but benevolent administration of which, has eminently distinguished your Lordship in the eyes of the profession, and of the public.

Your Lordship will permit me to join in that respect and veneration which is so justly entertained for your Lordship's high judicial character; and particularly to express the honour and gratitude I feel in being allowed to subscribe myself,

MY LORD,

Your Lordship's

Most obedient

and obliged humble servant,

THOMAS LEACH.

WESTER-COURT BUILDINGS,
WPLE, July 18, 1787.



TO THE RIGHT HONORABLE

THOMAS Lord PARKER,

Baron of MACCLESFIELD,

Lord Chief Justice of ENGLAND.

MY LORD,

THE following *Treatise*, containing that part of the law, which is peculiarly under the administration of the chief justice of *England*, I presumed, in regard to the subject of it, to think of presenting it to your lordship, which your goodness having been pleased to permit, it is with the less uneasiness that I venture to make it public; for I could not hope to introduce it into the world with greater advantage than under your protection.

This was the real ground of my ambition, to dedicate it to your lordship, and not to give myself an opportunity of publishing how much I honour those wonderful talents, that have raised you to so high a station: A private character indeed may be set forth to advantage, and many virtues in it be made known by an address of this nature, which might otherwise have lain for ever concealed: But your lordship's is public and conspicuous, and can appear no where with so much lustre as when you sit in judgment, where that vast genius you are blessed with, shines forth to all the world, adorned with all the improvements that human art can furnish, and supported with the greatest courage and integrity.

And nothing less, my lord, could give you that command of all the variety of business which comes before you, and that facility with which you dispatch it: The most intricate points of law, that have for ages lain in confusion and obscurity, when they fall under your lordship's consideration, receive such light, are stated and explained with such exact method, and such propriety and beauty of expression, that the most polite ~~compositions~~ appear not more elegant, nor the most demon-

The DEDICATION.

strative more convincing: This, my lord, is the agreeable part of the exercise of your authority, being no violence to that general humanity which you delight to shew to all mankind: But the duties of your office require you sometimes to put on another character and to shew the awful face of justice, to curb the rage of an unruly people, and to fright them into their duty by the terrors of the law; and 'tis with pleasure all good men see your lordship pursue the prevailing vices of the age with such zeal and indignation, that crimes no longer appear less odious for being fashionable, nor are they more secure from punishment for being popular.

These, My lord, are blessings which the whole nation shares in, and have an influence upon all parts of the civil administration: But we, who have the honour to attend your lordship at the bar, are in a more particular manner to acknowledge our obligations, for that candor and condescension with which you treat us: The encouragement you give to our weak endeavours, no less engages our affections, than your comprehensive knowledge and clear and accurate judgment command our reverence and esteem.

Such goodness charms all that approach and feel it; and it was with universal joy we saw your lordship's firmness to the present establishment, and great services to your country, distinguished lately by an accession of honor from his majesty, whose wisdom in conferring his favours has eminently appeared, by the many signal benefits the nation has received from those who have the honor to serve him. I am with the greatest respect,

MY LORD,

YOUR LORDSHIP'S

MOST OBLIGED,

AND MOST HUMBLE SERVANT,

WILLIAM HAWKINS.

THE

T . H . E

AUTHOR'S PREFACE.

NOTHING is more common than to hear those who have taken only a superficial view of the crown-law, charge it with numberless hardships and undistinguishing rigor; whereas those, who have more fully examined it agree, that it wants nothing to make it admired, for clemency and equity, as well as justice, but to be understood: It is so agreeable to reason, that even those who suffer by it, cannot charge it with injustice; so adapted to the common good, as to suffer no folly to go unpunished, which that requires to be restrained; and yet so tender of the infirmities of human nature, as never to refuse an indulgence, where the safety of the public will bear it; It gives the prince no power, but of doing good; and restrains the people from no liberty, but of doing evil.

It would be needless therefore to say any thing of the usefulness of this treatise, could I be so happy as any way to come up to the design of it, which was to vindicate the justice and reasonableness of the laws concerning criminal matters, and to reduce them into as clear a method, and explain them in as familiar a manner, as the nature of the thing will bear.

Had any of these great men, who formerly have written on this subject, gone through the whole law relating to it, all farther attempts of this kind had been unnecessary. The treatise, published under the name of Sir *Mathew Hale*, is indeed very useful, and written in a clear method, and with great learning and judgment; but it is certainly very imperfect in the whole, and seems to be only a model or plan of a work of this kind, which is said to have been intended by him.

Sir *Edward Coke*'s third Institute is also a treatise of great learning, and not unworthy of the hand that produced it; but yet it seems by no means a compleat work, many considerable heads being either wholly omitted in it, or barely touched upon.

The P R E F A C E.

The treatise of Sir *Will. Staundforde* seems to be writ with great judgment, but he takes in a very small compass, scarce mentioning any offences under felonies.

As for the treatises of *Lambard, Crompton, Pulton, and Dalton*, they having an eye chiefly to the direction of justices of peace; and, treating of the crown-law no farther than as it concerns them, are far from being compleat systems of it.

Upon the whole, I apprehend that none of the authors before mentioned were so perfect, but that, by reducing all the laws relating to this subject, under one general scheme, they might generally be understood with much less difficulty than they have hitherto been. This 'twas induced me to write on this subject, and I hope to finish the whole in two books, proposing in this first to shew the nature of criminal offences; and in the second, the manner of bringing offenders to punishment.

THE
EDITOR'S PREFACE
TO THE THIRD EDITION.

IN this edition abstracts of the statutes made since the Author wrote relating to the subject of this Treatise, have been added. Care has also been taken to make additional references to the reports published since our Author finished this work, and to Sir Matthew Hale's *Historia Placitorum Coronæ*. Such references as only tend to confirm what is advanced in the text are thrown into the margin; but where new points or differences seemed to occur, it was thought proper to place them, together with the abstracts of the statutes, by way of addition at the end of each book; by which means the learned serjeant's work is kept unmix'd with any thing of the editor's; and the pages of this edition are made to correspond with those of the former, so that references to our author from the modern books may be turned to with equal ease as before.

G. L. SCOTT.

THE
EDITOR'S PREFACE
TO THE FOURTH EDITION.

THE same method has been observed in this edition as by the above G. L. Scott, in referring not only to the Statutes, but also to the later Reports, viz. Lord Raymond's, Sir John Strange's, and other authors of the best authority, brought down to the present time.

THE
EDITOR'S PREFACE
TO THE FIFTH EDITION.

THIS edition is improved with extracts from the late Mr. J. Foster's *Crown Law*; *Cases Tempore Hardwicke Ch. J. Master Burrow's* and *Mr. Serjeant Wilson's Reports*; *Mr. J. Blackston's Commentaries*; and from the *Statutes*, to 10 Geo. III. inclusive.

PREFACE

P R E F A C E

TO THE

P R E S E N T E D I T I O N .

THE high estimation in which Mr. SERJEANT HAWKINS' Treatise of the PLEAS OF THE CROWN has been universally held by the Gentlemen of the profession, renders any attempt either to praise or to explain the original work unnecessary. But as the present edition is materially different, from all those which have preceded it, the Editor feels it incumbent on him to describe the general design upon which he has endeavoured to raise this invaluable production from its former state of imperfection.

This admired Treatise of Criminal Law, was first published soon after the accession of the present Royal Family to the throne. The increase of commerce, opulence, and luxury, since that period, has introduced a variety of temptations to fraud and rapine, which the legislature has been forced to repel, by a multiplicity of occasional statutes, creating new offences and inflicting additional punishments.—These statutes, are now, for the first time, incorporated with the original text, digested into order, and either arranged under the several titles to which they respectively belong, or erected into separate and independent chapters, in the form of Appendix.—To prevent, however, the reputation of the Author from the danger of being injured by any false or injudicious insertion of the Editor, the new matter is carefully distinguished by this mark †, at the opening of each section.

But while, during this interval, the legislature was thus anxiously providing new laws, to meet the various emergencies of the

PREFACE TO THE PRESENT EDITION.

the times, many of the statutes recited in the former editions of this work, either expired, or were repealed:—Of this dead and useless matter, the Editor has preserved such portions only, as are made the subjects of the author's observations.—These observations, it is true, are the expositions of statutes now extinct; but as they peculiarly form a part of the original composition, it would have been a violation of his duty as Editor, to have expunged them, and would have deprived the Author of a proportionate share of the veneration and respect with which every part of his work has been uniformly and deservedly honoured. The preservation of them indeed may prove essentially useful; for as many of the new statutes frequently pursue, with very little variation, the language of the old enacting clauses, the sound constructions that have expounded the one, will serve either directly, or by analogy, to illustrate and explain the other.

The many other parliamentary alterations which the criminal laws of this country have undergone, during the long course of near seventy years, are also ingrafted into the body of the work; and the whole text is carefully collated with the former editions, and with the printed statutes.

The multiplicity of marginal references, with which this work so peculiarly abounds, was continued, in the former editions, without intermission, throughout the page: and the eye was, thereby, forced upon a painful research, to find the letters by which their several applications were intended to be discovered. This obscurity is removed; and they are now placed opposite the respective sections to which they refer.—These references have also undergone a careful examination; those which were found to burthen the margin without illustrating the text are expunged; and new citations extracted from all the modern reporters are inserted in their stead. But this new arrangement of the references has compelled the Editor to abandon the usual mode of printing the pages of the old editions in the margin. He has, however, prefixed a table to each volume, which exhibits, at one view, where every page in the former editions begins and ends in the present work.

To the text thus formed and brought down to the present session of parliament, the determinations of the superior courts, decisions

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decisions of the judges upon reserved cases, and points ruled by authority upon trials, are added as commentaries, and made to accompany the sections they are designed to expound.

Upon this part of the work the Editor is fearful that his zeal not to omit any illustration, which, by possibility, might be useful, may have betrayed him into the error of inserting many notes, either not sufficiently compressed or superabundant. He flatters himself, however, that as many of them are transcribed from MANUSCRIPT CASES, which have never before been printed, their novelty will, in some measure, compensate both for their length and multiplicity.

The sources from which he has derived his collection of manuscript cases have been various; but he has inserted those only which appeared to him to possess unquestionable authenticity. If, upon inspection, any should be found not perfectly correct, it should be remembered, that decisions upon reserved cases of criminal law, are not, like arguments relating to property, open to the acquisition of attentive industry in WESTMINSTER-HALL, but, being, in general, discussed by the judges themselves, and the resolutions delivered at the several circuits, on which the cases arose, they are to be acquired only by the favour of the judges, or by the private friendship of those to whom they may have been communicated. Upon this subject the Editor, with a mixture of pride and gratitude, acknowledges the great and liberal assistance he has received from his professional friends, whose kindness will, perhaps, be found to form the most valuable part of the work.

The Author, in his Preface, declares that it was his intention "to reduce all the laws relating to THE PLEAS OF THE CROWN, under one general scheme, that they might be understood with much less difficulty than they had been."—To accomplish this design of his Author, the Editor has anxiously endeavoured to form the work into one complete and entire code of *English* criminal jurisprudence, as it exists at this day, upon the records of the law: but he is fearful that his zeal has led him to attempt a performance too difficult for his exertions to attain, as, upon a review of the sheets, several alterations and arrangements have suggested themselves to his mind, which he conceives would have rendered the whole more perfect and complete.

Confident,

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Confident, however, that no pains have been spared, and relying that the work has received a real and useful improvement from the alterations and additions which have been made, he respectfully submits his labours to the judgment, censure, and protection of a learned and liberal profession.

ANALYSIS

OF THE FIRST BOOK OF

The Pleas of the Crown.

ALL persons whatsoever are liable to be punished as criminal offenders, unless they can excuse themselves, either,

- 1 In respect of their want of reason ;
or,
- 2 In respect of their subjection to the power of others, c. 1.

Offences, considered in relation to the persons against whom they are committed, are either,

- 1 Such as are more immediately against God ; or,
- 2 Such as are more immediately against man.

Offences more immediately against God, are either by common law or by statute.

Those at common law are either capital, or not capital.

The capital are of three kinds.

- 1 Heresy, c. 2.
- 2 Witchcraft, c. 3.
- 3 Sodomy, c. 4.

Those not capital are either by common law or statute.

Those by common law are of five kinds,

- 1 Blasphemies against God, c. 5. f. 1.
- 2 Scoffing at the scriptures, c. 5.
- 3 ~~Impudencies~~ ^{Impudencies} in religion, c. 5. f. 3.

4 Open lewdness grossly scandalous, c. 5. f. 4.

5 Seditious words against the established religion, c. 5. f. 6.

Those by statute are two-fold,

- 1 Such as are against religion in general.
- 2 Such as are against the established church.

Those against religion in general are of four kinds,

- 1 Profanations of the Lord's day, c. 6. f. 1, 2, 3.
- 2 Profane swearing and cursing, c. 6. f. 4.
- 3 Drunkenness, c. 6. f. 5.
- 4 Reviling the Lord's Supper, c. 6. f. 6.

Those against the established church are three-fold.

- 1 Such as concern all persons in general.
- 2 Such as more immediately relate to those of the popish religion.
- 3 Such as more immediately regard protestant dissenters, c. 16.

Those which concern all persons in general, are either,

- 1 Against the common prayer, c. 7. or,
- 2 In accepting or holding an office without due conformity to the church, c. 8. or,

AN ANALYSIS OF THE PLEAS OF THE CROWN.

- 3 In teaching school without conforming to the church, c. 9. or,
- 4 In not coming to church. c. 10.

Those relating more immediately to persons of the popish religion, are of four kinds,

- 1 Popish recusancy, c. 12.
- 2 The offence of saying or hearing of mass, or other popish service, c. 13.
- 3 The offence of not making a declaration against popery, c. 14.
- 4 The offence of promoting or encouraging the popish religion; either,
 - 1 In giving or receiving popish education, c. 15. f. 1, 2, 3.
 - 2 In professing the popish religion, c. 15. from f. 4. to f. 15.
 - 3 In buying or selling popish books, c. 15. f. 15.

Offences more immediately against man, are either more immediately against the king, or more immediately against the subject.

Those more particularly against the king, are either capital or not capital.

The capital are either,

- 1 High treason; or,
- 2 Felonies.

High treason is either,

- 1 Such as is within 25 E. 3. and other statutes grounded upon it, and explaining it; or,
- 2 Such as depends upon subsequent statutes.

Of treason within 25 Ed. 3. there are four species.

- 1 That which immediately concerns the king, his wife or children, c. 17. f. 3, 4, &c.
- 2 That which concerns his office in the administration of justice, c. 17. f. 46.
- 3 That which concerns his seal, c. 17. f. 48.
- 4 That which concerns his coin, c. 17. f. 54.

Of high treason depending on subsequent statutes, there are three species.

- 1 Offences in upholding or favouring the power of the pope.
- 2 Offences against the protestant succession, c. 17. f. 85.
- 3 Offences in lifting men without the king's licence, c. 17. f. 86.

Of offences in upholding or favouring the power of the pope, there are five species.

- 1 Extolling the pope's power, c. 17. f. 72.
- 2 Putting in use popish bulls, c. 17. f. 75.
- 3 Perverting others, or being perverted to popery, c. 17. f. 76.
- 4 Receiving popish orders or education in popish seminaries, and not submitting, &c. c. 17. f. 79.
- 5 Refusing a second tender of the oaths, c. 17. f. 84.

Felonies more immediately against the king, are of five kinds,

- 1 Offences relating to the coin or bullion.
- 2 Offences against the king's council, c. 18. f. 8.
- 3 The offence of passing beyond sea, to serve a foreign prince, c. 18. f. 10.
- 4 The offence of embezzling the king's armour, c. 18. f. 12.
- 5 The offence of relieving a popish priest, c. 18. f. 14.

Of felony relating to the coin or bullion, there are three species.

- 1 The offence of debasing it, c. 18. f. 1.
- 2 The offence of unlawfully diminishing it, c. 18. f. 2.
- 3 The offence of endeavouring by extraordinary means to increase it, c. 18. f. 7.

Of offences more immediately against the king, not capital, there are two kinds,

- 1 *Premunire*.
- 2 *Misprision*.

Offences coming under the notion of *premunire*, are either,

- 1 Against

AN ANALYSIS OF THE PLEAS OF THE CROWN.

- 1 Against the prerogative of the crown; or,
- 2 Against the authority of the king and parliament, c. 19. f. 24.

Of offences of this kind against the prerogative of the crown, there are nine species,

- 1 Making use of papal bulls, c. 19. f. 11.
- 2 Derogating from the king's common law courts, c. 19. f. 14.
- 3 Appealing to Rome from any of the king's courts, c. 19. f. 20.
- 4 Exercising the jurisdiction of a suffragan, without the appointment of the bishop of the diocese, c. 19. f. 21.
- 5 Refusing to elect or consecrate the person nominated by the king to a bishoprick, c. 19. f. 22.
- 6 Maintaining the pope's power, c. 19. f. 23.
- 7 Bringing in *Agnus Dei*, c. 19. f. 24.
- 8 Contributing to the maintenance of a popish seminary, c. 19. f. 26.
- 9 Refusing the oaths, c. 19. f. 27.

Misprisions more immediately against the king are either negative or positive.

The negative is commonly called misprision of treason, c. 20.

Positive misprisions of this kind either amount to misprision of treason, or do not.

Of such misprisions, amounting to misprisions of treason, there is only one species; forging foreign coin not current here, c. 20. f. 7.

Of such misprisions not amounting to misprision of treason, there are four kinds,

- 1 Contempts against the king's palace or courts of justice, c. 21.
- 2 Contempts against his prerogative, c. 22.
- 3 Contempts against his person or government, c. 23.
- 4 Contempts against his title, c. 24.

Of contempts against the king's prerogative, there are three species,

- 1 Refusing to assist him, for the good of the public, c. 22. f. 2.

- 2 Preserving the interests of a foreign prince to that of our own, c. 22. f. 3.
- 3 Disobeying the king's lawful commands or prohibition, c. 22. f. 4.

Of contempts against the king's person or government, there are six kinds,

- 1 Charging the government with oppression or weak administration, c. 23. f. 2.
- 2 Doing an act which impliedly encourages rebellion, c. 23. f. 4.
- 3 Endeavouring to frighten the king into a change of his measures, c. 23. f. 4.
- 4 Spreading false rumours concerning the king's intentions, c. 23. f. 5.
- 5 Charging him with a breach of his coronation oath, c. 23. f. 6.
- 6 Speaking contemptuously of him, c. 23. f. 7.

Of contempts against the king's title, there are two kinds,

- 1 Denying his title, c. 24. f. 1.
- 2 Refusing to take the oaths required by law for the support of his government.

Of offences in refusing to take such oaths, there are two kinds,

- 1 The offence of refusing the oath required by common law, c. 24. f. 3.
- 2 The offence of refusing the oaths required by statute.

Of offences in refusing the oaths required by statute, there are two kinds,

- 1 The offence of refusing the oaths of allegiance and supremacy, c. 24. f. 4.
- 2 The offence of refusing the oath of abjuration, c. 24. f. 6.

Offences more immediately against the subject, are either capital or not capital.

The capital are either by the common law or by statute.

Those by the common law are committed either,

- 1 Against

AN ANALYSIS OF THE PLEAS OF THE CROWN,

- 1 Against the life of a man; or,
- 2 Against his goods; or,
- 3 Against his habitation; or,
- 4 Against public justice.

Those against the life of a man, are either,

- 1 Casual, not being occasioned by the default or procurement of any man, c. 26. or,
- 2 Such as come under the notion of homicide, being occasioned by a man, c. 26. f. 2.

Of homicides there are two kinds,

- 1 Such as is committed against a man's own life, c. 27.
- 2 Such as is committed against the life of another.

Of homicide against the life of another, there be two kinds,

- 1 Such as amounts not to felony.
- 2 Such as amounts to felony.

Of such homicide not amounting to felony, there are two kinds,

- 1 Justifiable.
- 2 Excusable.

Justifiable homicide is either of a public or a private nature.

That of a public nature is of two kinds,

- 1 Such as happens in the due execution, c. 28. f. 4. and,
- 2 Such as happens in the due advancement of public justice.

Of the latter there are two kinds,

- 1 Such as happens in criminal, c. 28. f. 11. and
- 2 Such as happens in civil causes, c. 28. f. 17.

Of justifiable homicide of a private nature, there are two kinds,

- 1 Such as happens in killing a wrong-doer, c. 28. f. 21.
- 2 Such as happens in killing an innocent person, c. 28. f. 26.

Of excusable homicide there are two kinds,

- 1 Homicide *per infortunium*, c. 29. f. 1.

- 2 Homicide *se defendendo*, c. 29. f. 12.

Homicide against the life of another, amounting to felony, is either with or without malice.

That which is without malice is called manslaughter or chance-medley, c. 20.

Of such homicide with malice there are two kinds,

- 1 Murder, c. 31.
- 2 Petit treason, c. 32.

Of murder there are two kinds,

- 1 Such as is done with express malice.
- 2 Such as is done with implied malice.

Of murder done with express malice, there are three kinds,

- 1 Such as happens in duelling, c. 31. f. 21.
- 2 Such as happens in killing another without any provocation; or but upon a slight one, c. 31. f. 32.
- 3 Such as happens in killing one whom the person killing intended to hurt in a less degree, c. 31. f. 28.

Murder done with implied malice generally happens in the following instances:

- 1 Where the principal intention is to commit another felony, c. 31. f. 41.
- 2 Where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain, c. 31. f. 46.
- 3 Where the chief motive is to assist a third person, c. 31. f. 49.
- 4 Where the direct design is to escape from an arrest, c. 31. f. 55.
- 5 Where the principal purpose is to usurp an illegal authority, c. 31. f. 59.
- 6 Where no mischief is intended at all, c. 31. f. 61.

Of petit treason there are three kinds, c. 32.

- 1 Where a servant kills his master.
- 2 Where a wife kills her husband.
- 3 Where an ecclesiastical person kills his prelate.

AN ANALYSIS OF THE PLEAS OF THE CROWN:

Of capital offences at common law against the goods of another, there are two kinds.

- 1 Simple larceny.
- 2 Mix'd larceny.

Of simple larceny there are also two kinds.

- 1 Grand larceny, c. 32. s. 1.
- 2 Petit larceny, c. 32. s. 31.

Mix'd larceny is either from the person of a man, or from his house, c. 36.

Of mixed larceny from the person, there are two kinds,

- 1 Robbery, c. 34.
- 2 Larceny from the person, c. 35.

Also there is another offence of this nature called piracy, c. 37.

Capital offences at common law against the habitation of a man, are of two kinds,

- 1 Burglary, c. 38.
- 2 Arson, c. 39.

Offences more immediately against the subject, made capital by statute, are such as are committed,

- 1 Against women, (and of these there are two kinds,

- 1 Rape.
- 2 Forcible marriage.)

- 2 Against the rights of marriage, c. 43.

- 3 Against the members of a man's body, c. 44.

- 4 Against records, c. 45.

- 5 Against cattle, c. 56.

- 6 By purveyors, c. 47.

- 7 By soldiers and mariners, c. 48.

- 8 By hunters, c. 49.

- 9 By destroyers of fences, turnpike roads and bridges, c. 50.

- 10 By gaolers, c. 51.

- 11 By transporters of sheep or wool, c. 52.

- 12 By servants, c. 53.

- 13 By Egyptians, c. 54.

- 14 By cutters of pow-dike, c. 55.

- 15 By trespassers on the borders and rioters, c. 56.

- 16 By bankrupts, c. 57.

- 17 By counterfeiters of bank notes, exchequer bills, stamps, South-sea bonds, lottery orders, &c. c. 58.

- 18 Against property adherent to the freehold. App. 1.

- 19 Against ships in distress, &c. App. 2.

- 20 By taking fish, &c. App. 3.

- 21 By malicious incendiaries. App. 4.

- 22 By shooting at another, and threatening letters. App. 5.

- 23 By smugglers. App. 6.

- 24 By buying and receiving stolen goods. App. 7.

- 25 By advertising a reward. App. 8.

- 26 By destroyers of garments, hop-binds, and mine engines. App. 9.

- 27 By destroying of looms, &c. App. 10.

- 28 By not performing quarantines. App. 11.

- 29 By hindering the exportation of corn. App. 12.

- 30 By returning from transportation. App. 13.

- 31 By assaulting with intent to rob. App. 14.

Offences more immediately against the subject not capital, are of two kinds,

- 1 Misprision of felony, c. 59.
- 2 Other inferior offences.

Such inferior offences are of two kinds,

- 1 Such as amount to an actual disturbance of the peace.

- 2 Such as do not amount to such a disturbance.

For the prevention of the former of these kinds of offences, the law has provided two remedies,

- 1 By surety for keeping the peace, c. 60.

- 2 By surety for the good behaviour, c. 61.

Of the abovementioned offences amounting to the actual disturbance of the peace, there are two kinds;

- 1 Such as may be committed by one or two persons.

- 2 Such as require a greater number.

Of those which may be committed by one or two persons, there are four kinds;

- 1 Assaults, c. 62. s. 1.

- 2 Batteries, c. 62. s. 2.

- 3 Affrays,

AN ANALYSIS OF THE PLEAS OF THE CROWN.

- 3 Affrays, c. 63.
- 4 Forcible entries and detainers, c. 64.

Of those which require a greater number of persons there are three kinds,

- 1 Riots, c. 65. f. 1.
- 2 Routts, c. 65. f. 8.
- 3 Unlawful assemblies, c. 65. f. 9.

Of such inferior offences not amounting to an actual disturbance of the peace, there are two kinds,

- 1 Such as are committed by officers.
- 2 Such as are committed by common persons, without any relation to an office,

Of offences of this nature, committed by officers, there are three species.

- 1 Neglect or breach of duty, c. 66.
- 2 Bribery, c. 67.
- 3 Extortion, c. 68.

Of offences of this nature, committed by private persons, without any relation to any office, there are two kinds,

- 1 Such as are infamous and grossly scandalous, proceeding from principles of downright dishonesty, malice, or faction.
- 2 Such as are of an inferior nature, and neither infamous nor grossly scandalous.

Of offences of the first sort, there are six species,

- 1 Perjury, c. 69.
- 2 Forgery, c. 70.
- 3 Cheats, c. 71.
- 4 Conspiracy, c. 72.
- 5 Libels, c. 73.
- 6 Keeping of a bawdy-house, and other unlawful place, c. 74.

Of offences of the latter sort, there are two kinds,

- 1 Such as more immediately affect the public.

- 2 Such as more immediately affect the interests of particular persons.

Of those which more immediately affect the public, there are four kinds,

- 1 Common nuisances, c. 75.
- 2 Monopolies, c. 79.
- 3 Forestalling, engrossing, and regrating, c. 80.
- Of victuals, app.
- 4 Barratry, c. 81.

The most remarkable kinds of common nuisances are,

- 1 Such as relate to highways and turnpike roads.
- 2 Such as relate to public houses, c. 78.

Those which relate to highways come under a twofold consideration,

- 1 As they relate to highways and turnpike roads in general, c. 76.
- 2 As they relate to bridges in particular, c. 77.

Of the offences above-mentioned more immediately affecting the interests of particular persons there are three kinds,

- 1 Usury, c. 82.
- 2 Maintenance.
- 3 Buying or selling a pretended title, c. 86.

Maintenance is two-fold.

- 1 *Ruralis*, c. 65. f. 2.
- 2 *Curialis*, c. 82. f. 3.

Of maintenance *curialis* there are three species,

- 1 General maintenance, c. 83. f. 4.
- 2 Champerty, c. 84.
- 3 Embracery, c. 85.

Of seducing artificers.

Of acting plays without licence.

Of embezzling naval stores.

Of exercising a trade without serving apprenticeship.

Of granting fraudulent permits.

Of surcharging boats.

Of vagrants.

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O F

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Sid.	<i>Siderfin's Reports.</i>
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Page 9 chap. 4, dele *horrendum*, &c.

75 line 5, instead of "*with such licence*," read "*without such licence*."

125 note (1), line 2, instead of "*pound*" read "*pound*."

132 sect. 3, after "*B. Tres. B. 12.*" in mar. read "*Lucas 95.*"

133 sect. 7, lines 3 and 4, instead of "*may be*," read "*is*."

153 sect. 7, line 4, instead of "*if it been*," read "*if it had been*."

164 sect. 18, note (d), after "*MS.*" read "*Sed Vide 1 Shower 53.*"

168 after line 16, " read " 30 *By return from transportation—31 By affaulking with intent to rob.*"

172 after sect. 10, " read "*Secondly.*"

173 sect. 12, line 18, note in mar. after "*penalties*," read "*vide also upon this subject.*"

175 instead of "*cb. 34*," read "*cb 44.*"

177 sect. 4, line 11, instead of "*Justice Ingram*," read "*Justice Hengham.*"

250* line 5, after "*Edward*," read "*the Fourth.*"

290 sect. 54, instead of "*lease now expired*," in mar. read "*lease then expired.*"

312 sect. 2, note (1), line 3, after "*383*," read "*12 Mod. 314.*"

386 note (14), line 13, instead of "*inquisition are made*," read "*be made.*"

457 line 32, of the text, instead of "*punished or for*," read "*punished as for.*"

470 sect. 1, line 2, instead of "*an allowance*," read "*is an allowance.*"

526 sect. 13, after "*12 Mod. 516*," in mar. read "*2 Atkins 340.*"

A

T R E A T I S E

O F

THE PLEAS OF THE CROWN.

BOOK THE FIRST.

CHAPTER THE FIRST.

OF THE PERSONS WHO MAY BE GUILTY OF CRIMINAL OFFENCES.

THE guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it. Therefore, before I come to the several kinds of offences, I shall shew what degrees of discretion and freedom are required in the commission of them. For the better understanding whereof, I shall consider what offenders are excuseable.—First, in respect of their want of reason.—Secondly, in respect of their subjection to the power of others.

SECT. 1. As to the First point it is to be observed, that those who are under a natural disability of distinguishing between good and evil, as (1) infants under the age of dis-

i Hale 14.
4 Comm. 21.
Puff. b. 3. c. 3.
B. Cor. 61.
170.
Pult. 125, 126.
129.
Sum. 10. 28. 43. 3 Inst. 4. Dalt. c. 147. 1 Hale 16. 29. 515. Co. Lit. 247. 4 Co. 124.
Hob. 224. 8 St. Tr. 322.

(1) On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes the human mind has acquired, at this period, a complete sense of right and wrong. Dr. & St. c. 26. Co. Lit. 79. 171. 247. Dalt. 476. 505.—During the interval between the age of fourteen years and that of seven, the mind is *prima facie* presumed to be unacquainted with guilt. And these presumptions entertained in favour of innocence, accumulate in an inverse proportion with the decrease and tenderness of the offender's years. 1 Hale 25. 27. From this supposed imbecillity of mind, the protective humanity of the law will not, without anxious circumspection, permit an infant to be convicted on his own confession. C. Jac. 466. 3 Hale 24. Fof. 70. Yet if it appear by strong and pregnant evidence and circumstances that he was perfectly conscious of the nature and malignity of the crime, the *verdict* of a jury may find him guilty, and judgment of death may be given against him. 1 Hale 20. 25. 434. B. Cor. 133. 4 Comm. 23. Fof. 71. O. B. 1784. p. 971: For *malitia supplet aetatem*; and the capacity of contracting guilt is measured more by the apparent strength of the offender's understanding than by years and days. B. Cor. 74. 4 Comm. 23. But within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for *ex presumptione juris*, he cannot have discretion: and against this presumption no averment shall be admitted. Mirr. c. 4. s. 6. Plowd. 19. 1 Hale 20. Fof. 349. 4 Comm. 23. Cowp. 222, 223. Therefore if a child under this age steal the goods or fire the house of another, he cannot be punished for either the larceny or the arson. 1 Hale 19. 514. Fof. 113. 349. But there is an instance of a pardon granted to an infant for homicide committed within the age of seven years. Regist. 309.

cretion, ideots and lunaticks, (2) are not punishable by any criminal prosecution whatsoever.

(2) Ideocy is a defect of understanding, from the moment of birth; Co. Litt. 247. F. N. B. 530. 1 Comm. 304. a person therefore, *born* deaf and dumb is *primâ facie* within this definition. B. Cor. 217. 1 Hale 34.—Lunacy is a partial derangement of the intellectual faculties, the senses returning at uncertain intervals; the offender therefore is only protected from punishment for acts done during the prevalence of his disorder. 1 Hale 31. 4 Comm. 24.—Madness is a total alienation of the mind. 1 Hale 30. 4 Co. 124. These defects, whether permanent or temporary, must be unequivocal and plain, not an idle frantic humour, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind. 8 St. Tr. 322. 1 Hale c. 4. O. B. 1784. p. 257.

2 Roll. 324. **SECT. 2.** Indeed it was anciently holden, in respect of that
F. Cor. 351. high regard which the law has for the safety of the king's
Reg. 309. person, that a madman might be punished as a traitor, (3)
Sum. 43. for killing or offering to kill the king; but this is contradicted
3 Inst. 6. by the later opinions.
Co. Lit. 247.
4 Co. 124.
1 Hale 36, 37. 4 Comm. 25.—(3) See 33 H. 8. c. 20. repealed by 1 & 2 P. & M. c. 10.

26 Aff. 27. **SECT. 3.** And it seems agreed at this day, that if one, who
Sav. 57. has committed a capital offence, become *non compos* before
Sum. 10. conviction, he shall not be arraigned; and if after conviction,
1 And. 107. that he shall not be executed.
109.
3 Inst. 4. 6.
1 Hale 34, 35. 4 St. Tr. 205. 8 St. Tr. 285. 4 Comm. 24, 25. 388.

Publ. 6. 22 Aff. **SECT. 4.** But by 17 Geo. 2. c. 5. s. 20. (which seems agree-
56. able to the ancient common law) it is enacted, "That it shall
(The 12 Anne, c. 23. upon this subject which was recited in the former edition is repealed by 13 Geo. 2. c. 24.) "and may be lawful for any two or more justices of the peace
"where a dangerous lunatick shall be found, by warrant
"under their hands and seals, directed to the constables,
"churchwardens, and overseers or some of them, of the
"parish or place, to cause such lunatick so to be apprehend-
"ed, and kept safely locked up in some secure place within
"the county, or precinct where the parish or place shall lie,
"as such justices shall under their hands and seals direct and
"appoint; and (if such justices find it necessary) to be there
"chained, if the last legal settlement of such person, shall
"be in any parish or place within such county or precinct;
"and if such settlement shall not be there, then such danger-
"ous lunatick shall be sent to the last legal settlement by pass
" (*mutatis mutandis*) as aforesaid; and shall be locked up or
"chained by warrant of two justices of the county to
"which such person is so sent (4)."—And, by the com-
mon law, if it be doubtful whether a criminal, who at his trial
is in appearance a lunatick, be such in truth or not, it
shall be tried by an inquest of office, to be returned by the

(4) But this act relates only to vagrant lunaticks who are strolling up and down the country, and does not extend to persons of rank and condition in the world, whose relations can take care of them properly by applying to the court of Chancery. 2 Atk. 52.

Sheriff

sheriff of the county wherein the court sits; (5) and if it be found by them that the party only feigns himself mad, and he still refuse to answer, he shall be dealt with as one that stands mute. (6).

(5) Every person of the age of discretion is presumed of sane memory until the contrary appear, which may be either by the inspection of the court, 1 Hale 33. Tr. p. Pais 14. O. B. 1783. No. 4.—By evidence given to the jury, who are charged to try the indictment. 3 Bac. Abr. 81. 1 Hale 33. 35. 36. O. B. 1784. No. 288.—Or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *verdict* awarded, returnable *instantly*, in the nature of an inquest of office. For. 46. Kel. 13. 1 Lev. 61. 1 Sid. 72. 4 Comm. Appen. f. 3. And this method, in cases of importance, doubt, or difficulty, the court will, in prudence and discretion, adopt. 1 Hale 35. Sav. 50. 56. 1 And. 154.

(6) By 12 Geo. 3. c. 20. in felony and piracy the judgment shall be the same, on standing mute, as if the prisoner had confessed the indictment or appeal.

Sett. 5. And if one who wants discretion commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage.

2 R. Abr. 547. 3 Bac. Ab. 131. B. Cor. 6. Hob. 134. Co. Litt. 247. 289. Plow. 364. 2 Inst. 284. 414. Pop. 141. Brownl. 197. Noy 129. C. Jac. 467. 1 Hale 15, 16. 20. 4 Comm. 22. 2 Comm. 291.

Sett. 6. And he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober.

Cröm: 29. Co. Litt. 247. 1 Hale 32. Plow. 19. 4 Comm. 26. 8 St. Tr. 285. 4 Co. 125. Dalt. c. 148.

Sett. 7. Also he, who incites a madman to do a murder or other crime, is a principal offender, and as much punishable as if he had done it himself.

Kely. 53. Dalt. p. 533. 1 Hale 617.

Sett. 8. And if it appear by the circumstances, that an infant under the age of discretion could distinguish between good and evil, as if one of the age of nine or ten years kill another, and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit, &c. as much as if he were of full age. But in such a case the judges will in prudence respite the execution, in order to get a pardon: and it is said, that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon, &c. (7)

F. Cor. 118. 129. Sum. 44. 65. 12. Aff. 30. B. Cor. 6. 61. 133. 136. S. P. C. 16. 27. Dalt. 505. 35. H. 6. 11. 1 Hale 434. 589. 570. Plow. 19. Pult. 125. Fos. 70.

(7) This authority to dismiss him must be understood of a reprieve before judgment, or that the jury find the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil. 1 Hale 27.

Sett. 9. As to the second point, viz. How far those are to be excused who are under the power of others:—A feme covert is so much favoured in respect of that power and authority which her husband has over her, that she shall not

Leges Int. 58. S. P. C. 16. 42. 27 Aff. 40. Sum. 65. 4 Comm. 28. Kely. 31. 1 Hale 45. 516. 2 vol. 320. B. Cor. 16. 108. Dalt. 134. 157. O. B. 1784. p. 119. 786.

suffer any punishment for committing a bare theft (8) in company with, or by coercion of, her husband.

(8) This exemption extends to burglary, Kely 31. F. Cor. 199. and seemingly to robbery, as an offence of a nature certainly not *more* heinous. The reason of this rule is said to be "because the wife cannot know what property her husband may claim in the goods taken." 10 Mod. 63. If this be the true principle, the cases of robbery and burglary are in some measure distinguishable upon this subject; for in burglary, the absence or presence of the party is immaterial, but in robbery, presence is an unavoidable and essential ingredient to the crime, and affords to the wife an opportunity of judging in what *sort of right* the goods are taken.—*Vide, infra. sect. 11.*

3 Inst. 108.
Sum. 65.
1 Hale 44.

SecT. 10. Neither shall she be deemed accessory to a felony for receiving her husband, who has been guilty of it, as her husband shall be for receiving her. (9)

(9) Nor a principal, though the husband's offence be treason, for she is *sub potestate viri*, and bound to receive him. Neither is she affected by receiving, jointly with her husband, any other offender. 1 Hale, 48. For she cannot be admitted as a witness to discover even collaterally, her husband's guilt. Brownl. 47. Dalt. 540. 1 Hale 301. O. B. 1785. p. 181.

Sum. 65, 66.
Dalt. 104.
F. Cor. 199.

383.

2 B. c. 29, 134.

1 Hale 45 516.

2 Comm. c. 29.

were sole.

Lucas 63.

Kely 31.

S. P. C. 10.

19. 142.

4 Comm. 29.

Vide O. B. 1785.

No. 3.

SecT. 11. But if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion, of her husband, (10) she is punishable as much as if she

(10) Or receive stolen goods of her own separate act, without the privity of her husband, or, if he, knowing thereof, leave the house and forsake her company; she alone shall be guilty, as accessory. 22 As. 40. Dalt. 157. for the coercion which is supposed to be conveyed by the command or presence of the husband is only a presumption of law, and like other presumptions may be repelled. 1 Hale, 516.—In treason, no plea of coverture shall excuse the wife; no presumption of her husband's coercion shall extenuate her guilt, for he has no right to that obedience from a wife, which he, as a subject, has forgotten to pay. In murder also this privilege is denied, because the offence is repugnant to the laws of nature, which shall never be contravened by the refinements of civil society. 4 Comm. 29.

2 Roll. 39.

3 Keb. 34.

1 Sid. 410.

Hob. 95.

Salk. 384.

SecT. 12. Also a wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy-house; for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex.

SecT. 13. And generally a feme covert shall answer as much as if she were sole, for any offence, not capital, against the common law, or statute, (and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband) she may be punished for it without the husband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for an offence to which he is no way privy. And if a woman bring a malicious appeal for the death of her husband, known by her to be alive, she may be imprisoned for the false appeal, till she make fine to the king, and

3 H. 4. 171

F. Cor. 73.

B. Imp. 103.

and the husband shall go at large. But if a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same, (as he may be generally to any suit for a cause of action given by his wife) and shall be liable to answer what shall be recovered thereon. (11)

(11) She may be indicted alone for a riot. Dalt. 447. For selling gin against the injunctions of the 9 Geo. 2. c. 23. Str. 1120. For recusancy. Str. 1120. Hob. 96. 1 Sid. 410. 11 Co. 64. Sav. 25. For being a common scold, *communis rixatrix*. 6 Mo. 213. 239. For assault and battery. Salk. 384. For forestalling. Sid. 410. For usury. Skin. 348. For bartray. Bac. Ab. 280. Con. Roll. 39. Post. 243. For a forcibly entry. Post. 147. For keeping a gaming house. 10 Mod. 335. Keeping a bawdyhouse, if the husband does not live with her. 1 Bac. Abr. 294. For trespass or slander. Keilw. 61. R. Abr. 251. Leon. 122. C. Car. 376.

Sec. 14. Neither a son nor a servant are excused the commission of any crime whether capital or not capital, by the command or coercion of the father or master.

THERE are other exemptions from punishment, than those which have been mentioned in this chapter.—First, By casualty and misfortune; thus if in the execution of a lawful act, an unintended death or maim ensue, the party stands excused from all guilt. B. Cor. 229. 22 Aff. 71. 1 Hale, 39. Kel. 123. 4 Co. 124. 4 Com. 27.—Secondly, by ignorance or mistake; as when a man intending to do a lawful act, does that which is unlawful. Jones, 15. C. Car. 538. But this must be an ignorance, or mistake in fact, and not in law, for *ignorantia juris quod quisque tenetur scire neminem excusat*. Plow. 343. 1 Hale, 42. 4 Comm. 27.—Thirdly, By compulsion or necessity; as where the act proceeds from the lawful coercion of another; or arises from circumstances of unavoidable constraint; or the impulse of a just and well grounded apprehension of death. 1 Hale, 50. 54. Plow. 18. 3 Inst. 10. Brac. 16. Reg. 88. N. B. 177. 1 Comm. 131. 4 Comm. 30. And all these circumstances of accident, necessity, or infirmity, must be satisfactorily proved by the prisoner, unless they arise out of the evidence adduced against him. Fol. 255. Ld. Ray. 1493. Str. 773. 1 Hale, 34.

CHAPTER THE SECOND.

OF HERESY.

OFFENCES considered in relation to the persons against whom they are committed, are either,—First, such as are more immediately against God, or, Secondly, such as are more immediately against man.—Offences more immediately against God, are either by common law or by statute. Those at common law are either capital or not capital. The capital offences of this nature are of three kinds: Heresy. Witchcraft. Sodomy.—Concerning Heresy, I shall consider, 1. What it is. 2. By whom it is cognizable. 3. How it is punishable.

Sec. 1. As to the first point, it seems, that among protestants, heresy is taken to be a false opinion, repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the Christian faith, or at least of most high importance.

Sum. 3. 4.
4 Comm. 48.

Sec. 2. But it is impossible to set down all the particular errors, which may properly be called heretical, concerning which there are, and always have been so many intricate disputes. However, the first of Elizabeth, which erected the high-commission-court, having restrained the same from adjudging any points to be heretical, which have not been determined to be such, either by scripture, or by some one of the four first general councils, or by some other council, by express words of scripture, or by the parliament, with the assent of the convocation; it has been since generally holden, that these rules will be good directions to ecclesiastical courts in relation to heresy.

3 Inst. 40.
Sum. 3.

B. Heresy
passim.
4 R. Abr. 226.

Sec. 3. As to the second point, viz. By whom heresy is cognizable, it is certain, that the convocation may declare what opinions are heretical: but it hath been questioned of late, whether they have power at this day to convene and convict the heretick.

T. N. B. 269.
Sum. 5.
3 Hale. 392.
Gib. 401. 410.
12 Co. 56, 57.
93.
3 Inst. 40.
2 St. Tr. 275.

Sec. 4. However it is agreed, that every bishop may convict persons of heresy within his own diocese, and proceed by church-censures against those who shall be convicted; but it is said, that no spiritual judge, who is not a bishop, hath this power; and it has been questioned, whether a conviction before the ordinary were a sufficient foundation whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the convocation was.

Sec. 5. By 24. Hen. 8. c. 9. the arch bishop of either province may cite any person before him for heresy, if the immediate ordinary either consent thereto, or do not his duty in punishing the same.

27 H. 8. 14.
5 Co. 58.
Sum. 4.
Hob. 236.
3 Inf. 39.
12 Rep. 56.
Finch. 219.
1 Salk. 135.

Sec. 6. But it is certain, that a man cannot be proceeded against at the common law, in a temporal court, merely for heresy; yet if in maintenance of his errors he set up conventicles and raise factions, which may tend to the disturbance of the publick peace, it seemeth that he may in this respect be fined and imprisoned, upon an indictment, &c. at the common law.

3 Hale, 399.
3 Inst. 42.
Sum. 4.
1 Roll. 110.
2 Bulst. 300.

Sec. 7. Also a temporal judge may incidently take knowledge whether a tenet be heretical or not; as where one was committed by force of 2 H. 4. c. 5. for saying, that he was not bound by the law of God to pay tithes to the curate; and another for saying, that though he was excommunicated before man, yet he was not so before God. The temporal courts, on an *habeas corpus* in the first case, and an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute; for the king's courts will examine all things which are ordained by statute.

5 Co. 5.
3 And 197.

Sec. 8. Also in a *quare impedit*, if the bishop plead that he refused the clerk for Heresy, it seems that he must set forth the

the particular point, that it may appear to be heretical, to the court wherein the action is brought, which having consufance of the original cause, must by consequence have a power as to all incidental matters necessary for the determination of it; and, without knowing the very point alledged against the clerk, will not be able to give directions concerning it to the jury, who (if the party be dead) are to try the truth of the allegation.

Sett. 9. But if a man be proceeded against as an heretick in the spiritual court *pro salute animæ*, and think himself aggrieved, his proper remedy seems to be to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition from a temporal one, which, as it seems to be agreed, cannot regularly determine or discuss what shall be called heresy.

Sett. 10. As to the third point, viz. How heresy is punishable, there is no doubt but that at common law one convicted thereof, and refusing to abjure it, or falling into it again after he had abjured it, might be burnt by force of the writ, *de hæretico comburendo*, which was grantable out of chancery upon a certificate of such conviction; but it is said, that he forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*.

Sett. 11. But at this day the said writ *de hæretico comburendo* is abolished by 29 Car. 2. c. 9. And all the old statutes which give a power to arrest or imprison persons for heresy, or introduced any forfeiture on that account are repealed. Yet by the common law, an obstinate heretick being excommunicate is still liable to be imprisoned by force of the writ, *de excommunicato capiendo*, till he makes satisfaction to the church. And by 9 & 10 W. 3. c. 32. "If any person having been educated in, or having made profession of the Christian religion within this realm, shall be convicted in any of the courts of *Westminster*, or at the assizes, of denying any one of the persons in the holy Trinity to be God, or of maintaining that there are more Gods than one, or of denying the truth of the Christian religion, or the divine authority of the holy scriptures, he shall for the first offence be adjudged incapable of any office; and for the second, shall be disabled to sue any action, or to be a guardian, executor or administrator; or to take by any legacy or deed of gift, or to bear any office civil or military, or benefice ecclesiastical, for ever, and shall also suffer imprisonment for three years, without bail or mainprize, from the time of such conviction."

CHAPTER THE THIRD.

OF WITCHRAFT.

3 Inst. 44.
Dalt. p. 513.
514.

OF offenders of this nature there are said to be three kinds. —First, conjurers, who by force of certain magick words endeavour to raise the devil, and compel him to execute their commands.—Secondly, witches, who by way of friendly conference are said to bargain with an evil spirit to do what they desire of him.—Thirdly, forcerers or charmers, who by the use of certain superstitious forms of words, or by means of images, or other odd representations of persons or things, &c. are said to produce strange effects above the ordinary course of nature.

3 Inst. 44.
F. N. B. 269.
Summ. 6.
S. P. C. 38.
C. Eliz. 571.

Sect. 2. All these were anciently punished in the same manner as hereticks, by the writ *de hæretico comburendo* after a sentence in the ecclesiastical court, and a relapse. And it is said also, that they might be condemned to the pillory, &c. upon an indictment at common law.

1 Hale 383.
45 Ed. 3. 17.
B. Cor. 15.

Sect. 3. In the time of king Edward the third, one taken with the head and face of a dead man, and a book of forcery, was brought into the king's bench; but there being no indictment against him, he was sworn that from thenceforth he would not be a forcerer, and then delivered from prison, and the head was burnt at his charge: but this method seems to be obsolete at this day.

2 Keb. 719.

By 33 H. c. 8.
witchcraft and
forcery were
made fe-
lonry, without
clergy.—But
accessaries after
were intitled,
1 Hale 7.

Sum. 6. 7.
4 Inst. 45. con.

Sect. 4. By 1. Jac. 1. c. 12. (the only law now in force against these offenders) they are divided into two degrees; and those in the first degree, and their accessaries before, shall suffer as felons without clergy. Of these there are the four following species. *First*, Such as shall use any invocation or conjuration of any evil spirit: and such seem clearly to be within the law, tho' no spirit do actually appear.—*Secondly*, Such as consult, covenant with, entertain, employ, feed, or reward any evil spirit to any intent: and these are agreed to be within the statute, though nothing farther be done upon such consultation, &c.—*Thirdly*, Such as take up any dead person's body, or any part thereof, to be used in any manner of witchcraft: and these are also clearly within the statute, though they do not actually so use it.—*Fourthly*, Such as exercise any witchcraft, incantment, charm, or forcery, whereby any person shall be killed, destroyed, consumed, or lamed in his or her body, or any part thereof. But none are within this branch who do not actually effect such mischief.

1 Jon. 143.

Sect.

Sec. 5. Those in the second degree shall for the first offence suffer a year's imprisonment, and the pillory; and for the second, as felons without clergy. And these, by the manifest purport of the words of the act, which is very obscurely penned, seem to be divided into the two following species: *First*, Such as take upon them by witchcraft, enchantment, ^{12 Mod. 556.} charm or sorcery to tell where treasure is to be found, or where things lost or stolen may be found, or to do any thing ^{Vide 4 Geo.} to the intent to provoke any person to unlawful love, or to hurt or destroy any person in his or her body, though the same be not effected. *Secondly*, Such as shall use any witchcraft, &c. whereby any cattle or goods of any person shall be destroyed, wasted or impaired: but those, who take upon ^{Sum. 8.} them to do this, are not within the act unless they actually do it. ^{3 Inst. 46.}

† But this statute of James is repealed by 9 Geo. 2. c. 5. which enacts, "That no proceeding shall be had against any person for witchcraft, sorcery, enchantment or conjuration, or for charging another with such crimes; and that whoever shall pretend to exercise those acts, or shall undertake to tell fortunes, or pretend by crafty science to discover stolen goods, shall be imprisoned for one year, stand four times in the pillory, and find sureties as the court shall think fit." Also by 17 Geo. 2. c. 5. "All jugglers, fortune tellers, gypsies pretending physiognomy, palmistry, or the like crafty science, shall be deemed rogues and vagabonds, and suffer as the act directs."

CHAPTER THE FOURTH.

OF SODOMY.

Horrendum illud peccatum!!!

ALL unnatural carnal copulations, whether with man or ^{12 Co. 36, 37.} beast, seem to come under the notion of sodomy, which ^{3 Inst. 53.} was felony by the antient common law, and punished, according to some authors, with burning; according to others, ^{Puff. ch. 3.} with burying alive: but at this day by force of 25 H. 8. c. 6. ^{Fortesc. 91.} & 5 Eliz. 17. is punished in the same manner as other felonies, which are excluded from clergy. (1).

(1) According to Britton b. 6. c. 9. these unnatural offenders were on conviction committed to the flames. Fleta b. 6. c. 35. buries them alive within the earth, and the Mirrour c. 1. f. 14. consigns them, with just indignation, to shameful and eternal oblivion.

Sec. 2. 'In every indictment for this offence, there must be ^{12 Co. 36, 37.} the words *rem habuit veneream, & carnaliter cognovit*; and ^{3 Inst. 58.} ^{Qu. 1 Hale 628.} ^{670. Sed vide}

^{1 St. Tr. 388. Duffey's case 1721. Hollis's case, at Lincoln, 1731. Prentice's case, Admiral-ty 1746.}

consequently

consequently some kind of penetration, and also of emission, must be proved; but any the least degree is sufficient, and emission is *prima facie* an evidence of penetration.

† By the 22 Geo. 2. c. 33. s. 19. "If any person in his Majesty's fleet commits this crime, their aiders or abettors, they shall suffer death by court martial."

CHAPTER THE FIFTH.

OF OFFENCES AGAINST GOD NOT CAPITAL AT COMMON LAW.

3 Bac. Ab. 38.

OFFENCES more immediately against God not capital are either by the common law or statute. Those by the common law are,

1 Vent. 293.

3 Keb. 607.

2 Str. 834.

4 Comm. 59.

1 Black. 395.

Sec. 1. All blasphemies against God, as denying his being or providence, and all contumelious reproaches of Jesus Christ.

11 Mod. 142.

Str. 416. 783.

834.

1 Bar. K. B. 20. 1 Burn. 225. 4 Comm. 41. 3 Burn E. L. 201. Fitzg. 65.

Sec. 2. All profane scoffing at the holy scripture, or exposing any part thereof to contempt or ridicule.

1 St. Tr. 802.

1 Sid. 168.

1 Keb. 620.

Sec. 3. Impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, &c.

Can. 109.

Dalt. 124.

2 Haw. 61.

1 Haw. 132.

Sec. 4. All open lewdness grossly scandalous, such as was that of those persons, who exposed themselves naked to the people in a balcony in Covent-garden with most abominable circumstances.

1 Ven. 293.

3 Keb. 621.

Pop. 208.

1 Sid. 168.

Scobell 121.

4 Comm. 64, 65.

Str. 776.

788.

Ld. Ray. 451.

Sec. 5. Offences of this nature, because they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime.

2 R. Abr. 187.

C. Jac. 44. 421.

Sec. 6. Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace; as these, your religion is a new religion, and preaching is but prattling, and prayer once a day is more edifying.

CHAPTER THE SIXTH.

OF OFFENCES, AGAINST RELIGION.

OFFENCES, by statute, not capital, more immediately ^{4 Comm. 63.} against God, are either such as are against religion in general; or against the established church.

Those against RELIGION IN GENERAL, are of several kinds.

Sect. 1. First profanation of the Lord's Day.—By 27 Hen. 6. c. 5. "all manner of fairs and markets upon feast days, or on Sundays, (the four Sundays in harvest excepted,) shall clearly cease, on pain of forfeiting the goods exposed to sale." By 1 Car. 1. c. 1. "there shall be no meetings, assemblies, or concourse of people out of their own parishes on the Lord's day.—Nor any bear-beating, bull-baiting, interludes, common plays, or other unlawful exercises and pastimes used by any person or persons within their own parishes, (a) on pain of forfeiting 3 s. 4 d. to the poor for every offence, on conviction, before a magistrate, on view, confession, or the oath of one witness, "to be levied by distress, or, in default, to be set three hours in the stocks." By 3 Car. 1. c. 2. "no pack-horse, waggon, cart, wain, nor any drover with cattle, shall travel on the said day on pain of twenty shillings.—Nor shall any butcher (b) kill, or sell any victuals upon the said day on pain of 6 s. 8 d."

Dalton c. 46.
Gibson 236.

(a) This act impliedly allows innocent recreations, within the respective parishes, after divine service is over. 4 Comm. 63.

(b) This is no offence at common law, the

indictment therefore must conclude *contra formam statuti*. Strange 702. But at sessions it is usual to indict for the nuisance in keeping open shop. C. C. C. 372.

† *Sect. 2.* By 29 Car. 2. c. 7. "no tradesman, labourer, or other person, above the age of 14 years, shall exercise any wordly business, labour, or work of their ordinary callings on the Lord's day, (Works of necessity (c) and charity only excepted) on pain of forfeiting 5 s. And no person shall publicly cry, shew forth, or expose to sale (d) any wares, merchandizes, fruit, herbs, goods or chattels whatsoever, upon the Lord's day on pain of forfeiture. And by Par. 2. no drover, horse courser, waggon, butcher, higgler, or their servants, shall travel or come to his inn or

(c) Therefore a baker may bake victuals for dinner for his customers, 2 Burn 785. But *quare*, as to puddings, pies, bread, and hot rolls, 11 Mod. 114. Cowper

494. But the offender cannot be convicted more than once for any number of acts on the same day. *Crepps v. Durdens*. Trin. 17 Geo. 3. (d) By 1 Jac. 1. c. 22. no shoe-maker shall expose to his my shoes, &c. on pain of 3 s. 4 d. a pair.

Raymond 250.
5 Modern 449.
2 Salk. 672.
1 Modern 56.
Cro. Car. 602.
3 Bac. Abr. 39.
Term Reports,
265.

This *qui tam*
penalty must be
sued for within
six weeks.

Appointed by
the Watermen's
Company.

8 Modern 59.
Sess. Caf. 356.
Sayer 304.
Strange 498,
608, 686, 999.
Bur. 150, 1036,
2063. Ld.
Raym. 1368,
1376, 1387.
10 Modern 213.
1 Burn 401.

(a) In other
persons it is in-
tively optional.

4 Burn 299. N. B. This act directs the form of the conviction. Vide Burn's Just. 401.

"lodging on pain of 20 s. Nor shall any person use, employ,
"or travel with any boat, wherry, lighter, or barge, without
"permission from a justice, on pain of 5 s. And if any person
"which shall travel, be then robbed, no hundred shall be
"charged. And no person upon the Lord's day shall serve any
"writ, process, &c. (except in cases of treason or felony,) but
"the same shall be void and the offender liable in damages."
By 13 Geo. 3. c. 80. "no person shall on a Sunday or on
"Christmas day, kill any game, or use any gun, dog, net, or
"engine for that purpose, on pain from 10 l. to 20 l. for the
"first offence; from 20 l. to 30 l. for the second; and being
"committed for the third offence till the sessions, unless he give
"bail." By 21 Geo. 3. c. 4. "every place of publick en-
"tertainment or debating, opened upon any part of the Lord's
"day, to which admittance shall be had for money or tickets, or
"by charging an extraordinary price for refreshments, &c. shall
"be deemed a disorderly place, and the visible keeper shall for-
"feit 200 l. the chairman, 100 l. the person collecting the
"money or tickets, 50 l."

Self. 3. But by 10 & 11 W. 3. c. 24. "Mackrell are per-
"mitted to be sold both before and after divine service, on
"Sundays." And fish carriages (by 2 Geo. 3. c. 15.) shall be
"allowed to pass whether laden, or returning empty. By 11 &
12 W. 3. c. 21. "Forty watermen may ply on the Thames.
"And hackney coachmen and chairmen are permitted by 9
Ann. c. 23. to work within the bills of mortality." By 29
Car. 1. c. 7. "meat may be dressed and sold in inns, cook-
"shops, or victualling-houses." "And milk may be cried and
"sold, on the Lord's day, before 9 in the morning, and after
"4 in the afternoon."

Self. 4. Secondly, Profane cursing and swearing. By 19
Geo. 2. c. 21. "if any person shall profanely curse or swear,
"and be convicted on oath of one witness, or by confession,
"or by the hearing of one magistrate, he shall forfeit, first,
"Every day-labourer, common soldier, sailor, or seaman, 1 s.—
"2dly, Every other person under the degree of a gentle-
"man, 2 s.—3dly, Every person of, or above the degree of a
"gentleman, 5 s. On a second conviction double; and for
"every other, treble the sum first forfeited, for the benefit of
"the poor; or being a labourer or gentleman, confined to
"hard labour for 14 days, or being a common soldier,
"or sailor in employ, set in the stocks for one hour, for
"every single offence, and two hours for any greater num-
"ber at the same time." The constable to make infor-
"mation if the offender be known to him; if unknown he
is required to carry him before a justice. (a) The prosecution

must be within eight days. The act to be read in all churches after every quarter day. The magistrate neglecting his duty forfeits five pounds; the constable forty shillings, &c. And by 22 Geo. 2. c. 33. This offence committed in his Majesty's fleet, may be punished at the discretion of a court martial.

Sec. 5. Thirdly, Drunkenness, for which by 4 Jac. 1. c. 5. all persons whatsoever forfeit five shillings to the poor; and for which seamen may by 22 Geo. 2. c. 33. be punished by fine, &c. as the court martial shall think fit.

C. Car. 285.
1 Burn 40.
1 Jac. 1. c. 9.
7 Jac. 1. c. 10.
21 Jac. 1. c. 7.
1 Car. 1. c. 4.

Sec. 6. Fourthly, Reviling the sacrament of the Lord's supper with contemptuous words, &c. for which by 1 Edw. 6. c. 1. which was repealed by 1 Mary c. 2. and revived by 1 Eliz. c. 1. the offender shall be imprisoned, fined, and ransomed.

† By 3 Jac. 1. c. 21. "Whoever shall use the name of the holy Trinity profanely or jestingly, in any stage play, interlude, or shew shall be liable to a *qui tam* penalty of ten pounds." By 1 Will. 3. c. 18. f. 17. "Whoever shall deny in his preaching or writing, the doctrine of the blessed Trinity shall loose all benefit of the act for granting toleration, &c."

Sec. 7. I shall not mention the offences against 2 & 3 Edw. 6. c. 19. & 5 Eliz. c. 5. relating to fasts and fish-days, because it is expressly declared, that those statutes are enacted merely on a political account, and it is made penal to affirm that any eating of fish, or forbearing of flesh mentioned therein, is necessary to salvation, or that it is the service of God.

2 Burn. 185.
186.

CHAPTER THE SEVENTH.

OF OFFENCES AGAINST THE COMMON PRAYER.

OFFENCES against the established church are, First, Such as concern all persons in general; Secondly, Such as more immediately relate to those of the Popish religion; Thirdly, Such as more immediately regard Protestant dissenters.—Those which concern all persons in general are, First, Against the Common Prayer. Secondly, In accepting or holding an office without due conformity to the church. Thirdly, In teaching school without conforming to the church. Fourthly, In not coming to church.

Sec. 1. And first of offences against the Common Prayer. As to which it is to be observed, That by 2 & 3 Edw. 6. c. 1. & 6 Edw. 6. c. 1. which were repealed by 1 Mary 2. c. 2. and revived by 1 Eliz. c. 2. the Common Prayer Book, was first established

4 Comm. 50.
1 Lev. 295.
Can. 5, 6, 7.
Gib. 259.
3 Burn. E. L.
under 220.

under severe penalties, but the same penalties being repeated and enlarged by 1 Eliz. c. 2. and 13 and 14 Car. 2. c. 4. which enacts the use of the same common prayer with some alterations, those statutes of Edward the sixth, seem, at this day, to be of little use.

Self. 2. By 1 Eliz. c. 2. s. 4, 5, 6. "If any parson, vicar or other whatsoever minister, that ought to say the said Common Prayer, &c. shall refuse to use it in such church, &c. or other place where he should use to minister the same, or wilfully or obstinately standing in the same, use any other form, or speak any thing in derogation of the said book, or any thing therein contain'd, he forfeits for the first offence one year's profit of all his spiritual promotions, and shall suffer six months imprisonment; and for the second offence shall be deprived, &c."

Form of the indictment, 3 Mod. 78.

Self. 3. In the construction of this act it has been resolved. First, that under the words, "Parson, vicar, or other whatsoever minister, that ought or should say the said Common Prayer, &c." those clergymen who have no cure are included, as much as those who have one, and that they are punishable for using any other form, &c. inasmuch as by their ordination they are obliged to officiate in the offices of the church, &c. and it is said that they are sufficiently shewn to be in holy orders by the word *clericus* in an indictment.

Dyer 203.
2 Leo. 295.

Self. 4. Secondly, that this statute being not only in the affirmative, but also expressly saving the jurisdiction of ecclesiastical courts, does not restrain them from proceeding against these offenders in their own methods, as disturbers of the unity and peace of the church; and consequently that such persons may be deprived by the said court according to the course of the spiritual law, for the first offence.

Gib. 268.
5 Co. Cawdry's Case, 5, 6.
Pop. 59.
2 R. Abr. 222.

Self. 5. Also it is further enacted, by 1 Eliz. c. 2. s. 9. "That if any person shall in plays, songs, or other open words, speak any thing in derogation, depraving or despising of the said book, &c. Or by open fact compel, or otherwise procure or maintain any minister to say any Common Prayer openly, &c. in other form: or shall by any of the said means let any minister to say the said Common Prayer, &c. he shall forfeit one hundred marks for the first offence, and four hundred for the second, &c. (which if he pay not within six weeks after conviction, he shall suffer six months imprisonment for the first offence, and twelve for the second) and for the third offence shall forfeit all his goods and chattels, and shall suffer imprisonment for life."

Vide 7 & 8 Sections of this act. The 13 & 14 Car. 2. c. 4. enforced by 5 Ann. c. 5. and 22 Geo. 2. ch. 33 — 2 Shower 53.

Self. 6. It has been made a question in the construction of this clause, whether if the party die within six weeks, the said forfeiture be not discharged, since by the act of God the election of paying it, or suffering imprisonment in lieu of it, is taken away.

Dyer 203. 231.

CHAPTER THE EIGHTH.

OF OFFENCES IN ACCEPTING OR HOLDING AN OFFICE WITHOUT DUE CONFORMITY TO THE CHURCH.

OFFENCES in accepting or holding an office, without due conformity to the church, are of two kinds. First, in not receiving the sacrament both before and after the acceptance of an office. Secondly, in going to any other place for religious worship, than church during the continuance in an office. 4 Comm. 57.

Stat. 1. As to the first of these offences, it is enacted by 13 Car. 2. st. 2. c. 1. s. 10. 12. "That no person shall be placed, elected or chosen, to any office or place of mayor, alderman, recorder, bailiff, town-clerk, common-council-man, or other office of magistracy, place of trust, or other employment relating to the government of any city, corporation, borough, cinque port or other port town, who shall not have received the sacrament, according to the rights of the church of England, within one year next before such election; and that every person, so placed or elected, shall take the oaths of allegiance and supremacy, at the same time when the oath for the due execution of the said office, &c. shall be administered; and that the said oaths shall be administered and tendered by those who administer the oath of office, and in default of such, by two justices of the peace of the corporation, &c." Which makes it necessary in a return to a *mandamus*, setting forth that the party did not take the oaths before the mayor, &c. to add, that he did not take them before two justices of peace, &c. And it is further enacted, "That on default hereof, every such election, placing and choice shall be void." And it hath been adjudged to be no excuse, that the oaths were not tendered. 2 Vent. 247. Salk. 428. 5 Mod. 316. 2 Jon. 121. See vide 3 Burn 249.

† But now by 5 Geo. 1. c. 6. for establishing the peace and quiet of corporations, it is enacted, "That all persons required to take the said oath, or subscribe the said declaration, shall be confirmed in their respective offices, and be free from all incapacities and penalties; and none of their acts shall be questioned, notwithstanding their omission to take the oath, or subscribe the said declaration.—And that so much of the said act as requires the taking or subscribing the same is repealed." And it is further enacted, "That all persons in the actual possession of any office that were required by the above act, to take the sacrament within one year

“ year next before their election into such office shall be confirmed in their respective offices, and be discharged of all incapacities, and none of their acts shall be questioned, notwithstanding their omission to take the sacrament as aforesaid, nor shall they be removed by the corporation, or otherwise prosecuted for or by reason of such omission, unless such person be so removed, or such prosecution commenced within six months after the election” (1)

(1) If neither of these events have happened within the time limited, the election becomes absolute and unavoidable. 1 Black 229. Burr. 1013. Cowp. 539. 540. for the statute operated as a protection to the possession and not as a bar to the remedy. *Wid. infra* N. (2)

Ch. 24. f. 7. † However by 1 Geo. 1. st. 2. f. 13. amended by 2 Geo. 2. c. 31 and 9 Geo. 2. c. 26. “ All persons who bear any office, civil or military, &c. shall take the oaths, therein recited, of allegiance and supremacy (a); and the oath of abjuration (b).
 (a) As recited 6 Geo. 3. c. 53. “ Also all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration
 (b) As recited 1 W. & M. c. 1. f. 4. 8. “ against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4.
 (c) As recited 25 Car. 2. c. 2. f. 9. “ mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take
 2 Burr. 292. “ the oaths, by law required, at the time of their admission
 306. “ into such office, before such officer as shall preside at such
 4 Burr. 2132. “ election.”
 3 Burn 257. Sect. 2. Also it is enacted by 25 Car. 2. c. 2. “ That all
 4 Mod. 233. “ offices, civil and military, except those of inheritance,
 1 Geo. 1. st. 2. f. 13. post. “ appointing sufficient deputies, and all who have any fee, &c.
 ch. 24. f. 7. “ by patent from the king, except such as shall be granted
 “ for valuable consideration for life or years, and not relate
 “ to any office or place of trust, and also all who have any
 “ place of trust, or any employment in the king’s household,
 “ shall take the oaths of allegiance and supremacy, and test,

(2) For various decisions upon the corporation and test acts, as they respect the conduct of protestant dissenters *vide* the King v. Read, 2 Mod. 299. Mayor of Guilford v. Clark 2 Ventris 248. The King v. Lawwood, Skin. 574. 4 Mod. 269. Salk. 167. Carth. 306. and the King v. Grosvenor, Str. 1193. But in the case of Harrison, Chamberlain of London v. Evans in 1762. the question was very elaborately determined.—In 1748. the corporation of London, by a bye law, imposed a fine of six hundred pounds, upon every person, who, being elected, should refuse to serve the office of sheriff.—The plaintiff levied debt, in the sheriff’s court, against the defendant for this penalty. The defendant pleaded the 13 Car. 2. averring that he was a protestant dissenter within the toleration act, 1 & 2 W. & M. c. 18. of scrupulous conscience; and therefore had not received the sacrament. The plaintiff replied the 5 Geo. 1. c. 6. which confirms members of corporations in their respective offices, although they have not received the sacrament according to the directions of the 13 Car. 2. To this replication the defendant demurred; and judgment was given upon it in favour of the city. The defendant appealed to the court of hushings, where the judgment was affirmed. A special commission of errors was sued out by the defendant directed to Willes, Parker, Foster, Bathurst, and Wilmot; and, after great argument and deliberation, the judgment of the sheriff’s court, and the assuance by the court of hushings, were unanimously reversed. The plaintiff brought a writ of error in parliament; and on the 4th February 1767. Lord Mansfield, with five other judges against Perrot, were of opinion, that, upon the facts admitted by the pleadings in this cause, the defendant Evans, should be allowed to object to the validity of his election to the office of sheriff, in barr to the present action; by reason that he had not taken the sacrament within the time limited. Append. to Burneaux Letters. 2 Burn. Ecc. L. 168. Cowp. 393. 535.

“ the

" the next term, in the King's Bench, or Chancery, or
 " Quarter-Sessions, and receive the sacrament within three
 " months, and give in a certificate thereof, proved by two
 " witnesses, to the court wherein they take the said oaths.
 " And in case of neglect, shall be disabled to hold the said
 " offices, &c. and forfeit five hundred pounds, except femes
 " covert, &c."—But it hath been adjudged, that the persons
 so disabled lose only their right to the profits of their offices
 from the time of such disability; but that they lose nothing
 vested in them before. Also, it hath been adjudged to be no
 excuse for a person bound by law to accept a corporation
 office, that he is disabled to receive the sacrament, by having
 been excommunicated.—And *quære*, if it be any excuse, that
 his conscience will not suffer him to take it, being a protest-
 tant dissenter, &c. *Vide* note 2. p. 16.

Lutw. 910.
 2 Mod. 299.
 Gibb. 506.
 Comb. 315.
 Sav. 43.
 And. 200.

Sett. 3. Notwithstanding the words of the first of these
 acts are so very strong as to make such election, &c. void,
 and those of the second to make such persons disabled in law
 to all intents and purposes whatsoever, to have, occupy, or
 enjoy the said offices; yet it hath been strongly holden, that
 the acts of one under such a disability, being instated in such
 an office, and executing the same without any objection to
 his authority, may be valid as to strangers. For otherwise not
 only those who no way infringe this law, but even those whose
 benefit is intended to be advanced by it, might be sufferers for
 another's fault, to which they are no way privy; and one
 chasm in a corporation happening thro' the default of one
 head officer would perpetually vacate the acts of all others,
 whose authority, in respect of their admission into their offices,
 or otherwise, may depend on his.

3 Keb. 606,
 661, 682, 721.
 2 Jon. 81. 137.
 2 Lev. 184. 242.
 2 Mod. 193.
 3 Lev. 116.

Sett. 4. By 25 Car. 2. c. 2. s. 17. it is expressly provid-
 ed, that " The said act shall not extend to constables or
 " churchwardens, or such like inferior civil officers, or to a
 " bailiff of a manor or lands, or such like private officers."

5 Mod. 431.
 412.
Vide 3 Burn.
 258. and 1 Geo.
 1. st. 2. c. 13.
 1. 20.

But it hath been questioned, whether it extends to the
 censor of the college of physicians.

Sett. 5. As to the second offence of this kind, *viz.* that
 of going to any other place for religious worship than the
 church, during the continuance of an office, it is enacted,
 by 5 Geo. 1. c. 4. " That if any mayor, bailiff, or other
 " magistrate, in England, Wales, Berwick upon Tweed,
 " Jersey or Guernsey, shall knowingly or wilfully resort to, or
 " be present at any publick meeting, for religious worship,
 " other than the church of England, as by law established,
 " in the gown or other peculiar habit, or attended with the
 " ensign or the ensigns, of or belonging to such his office,
 " that every such mayor, bailiff, or other magistrate, being
 " thereof convicted by due course of law, shall be disabled
 " to hold such office, or employments, and shall be adjudged
 " incapable to bear any publick office or employment what-
 " soever

(The 10 Ann.
 c. 2. recited in
 the former edi-
 tion is repealed
 by the 5 Geo. 1.
 c. 4.)

4 Comm. 54.

“soever within England, Wales, Berwick upon Tweed,
“Jersey, or Guernsey.”

CHAPTER THE NINTH.

OF OFFENCES IN TEACHING SCHOOL
WITHOUT CONFORMING TO THE CHURCH.

AS to the offence of teaching school without conforming to the church, so far as it concerns all persons in general, it is enacted by 23 Eliz. c. 1. s. 6, 7. “That if
“any person or persons, body politick or corporate, shall
“keep or maintain any school-master, who shall not repair
“to church according to the form of the said statute, or
“be allowed by the bishop or ordinary of the diocese,
“ (who shall not take any thing for the said allowance) they
“shall forfeit for every month ten pounds; and such school-
“master presuming to teach contrary to the said act, and
“being thereof convicted, shall be disabled to be a teacher
“of youth, and shall suffer imprisonment, without bail or
“mainprize, for one year.”

Carth. 464. 465.
1 Vent. 41.
Vide 19 Geo. 3.
c. 44. Post Ch.
16. s. 5.

§ 2. And it is further enacted by 1 Jac. 1. c. 4. s. 9.
“That no person shall keep any school, or be a school-
“master, out of the universities or colleges of this realm,
“except it be in some publick or free grammar-school, or in
“some such nobleman’s, or noble woman’s, or gentleman’s, or
“gentle woman’s house, as are not recusants, or where the
“same schoolmaster shall be specially licensed thereunto by the
“archbishop, bishop or guardian of the spiritualities of that
“diocese, upon pain, that as well the school-master, as also
“the party that shall retain or maintain any such school-
“master, contrary to the meaning of the said statute, shall
“forfeit each of them, for every day so wittingly offending,
“forty shillings.”

(The 1st Anne
was recited in
the former
edition.)

As to popish
schoolmasters
in particular.
Vide ch. 5. s. 3.

† § 3. But it having been doubted whether such persons as are within the benefit of 1 William & Mary, c. 18. commonly called *the Toleration Act*, are not exempted from the penalties of the abovementioned statutes, it was explained by 12 Anne, st. 2. c. 7.—But this act being repealed by 5 Geo. 1. c. 4. the operation of the act of toleration is consequently revived, by which it is enacted “that neither
“the 23 Eliz. c. 1. nor any other law or statute of this
“realm, made against papists, or popish recusants, except
“25 Car. 2. c. 2. and 30 Car. 2. st. 2. c. 1. shall be
“contrued to extend to any person dissenting from the church
“of England that shall take the oaths mentioned in the
“first of William and Mary, and subscribe the declaration
“mentioned in the 30 Car. 2. c. 1.”

CHAP.

CHAPTER THE TENTH.

OF OFFENCES IN NOT COMING TO CHURCH.

FOR the better understanding of the offences of not coming to church, so far as the same relate to all persons in general, except such as are within the indulgence of 1 William & Mary, c. 18. which is commonly called *The Toleration Act*, I shall consider,—First, How far persons are punishable for their own absence from the church.—Secondly, how far they are punishable for suffering such absence in others.

In order to shew how far persons are punishable for their own absence, I shall consider the following particulars: First, What forfeitures of money, lands or goods, such offenders incur. Secondly, In what manner they are to be proceeded against for those forfeitures. Thirdly, What other inconveniencies they are subject unto. Fourthly, By what means they may be discharged.

As to the first point, I shall consider, *First*, What forfeitures of money; and, *Secondly*, What forfeitures of lands and goods such offenders are liable unto.

The forfeitures of money, to which they are liable, are threefold; 1. That of twelve pence for the absence of one Sunday, or other holy-day. 2. That of twenty pounds for the absence of every month contained in a conviction. 3. That of twenty pounds for the absence of every month after a conviction.

Sec. 1. And first, The forfeiture of twelve pence for the absence of one Sunday, or other holy-day, depends upon 1 Eliz. c. 2. by which it is enacted, “That all persons inhabiting within this realm, or any other the king’s dominions, shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place, where common prayer and such service of God shall be used, in such time of let, upon every Sunday, and other days ordained and used to be kept as holy-days, and then and there to abide orderly and soberly, during the time of the common prayer, preaching, or other service of God, there to be used and ministered, upon pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence twelve pence.”

By 3 Jac. c. 4. s. 27, 28. this forfeiture may be levied by the churchwardens by distress by warrant of one justice.

Sec. 2. In the exposition of this statute, the following opinions have been holden. *First*, That the indictment needs

2 Leon. 5. not shew that the party had no reasonable excuse for his absence, or that he is an inhabitant within this realm, &c. But that the defendant, if he have any matter of this kind in his favour, ought to shew it.

2 Roll. 438, 455. *Sect. 3. Secondly*, That if the spiritual court proceeding upon this statute, refuse to allow a reasonable excuse, they may be prohibited; but that if they proceed wholly on their own canons, they shall not be at all controlled by the common law (unless they act in derogation from it) as by questioning a matter not triable by them, as the bounds of a parish, &c. for they shall be presumed to be the best judges of their own laws.

1 Roll. 93. *Sect. 4. Thirdly*, That he who misbehaves himself in the church, or misses either morning or evening prayer, or goes away before the whole service is over, is as much within the statute as he who is wholly absent; and that he who is absent from his own parish church, shall be put to prove where he went to church.

1 And. 159. *Sect. 5. Fourthly*, That the offence in not coming to church consisting wholly in a non-attendance, and not supposing any fact done, but barely the omission of what ought to be done, needs not be alledged in any certain place; for, properly speaking, it is not committed any where.

Prec. of declaration, Lutwych. 201, 208. *Sect. 6. Secondly*, The forfeiture of twenty pounds for the absence of a whole month contained in a conviction, depends upon 23 Eliz. c. 1. s. 5. by which it is enacted "That every person, above the age of sixteen years, who shall not repair to some church, chapel, or usual place of common prayer, but forbear the same, contrary to the tenor of the said statute of 1 Eliz. ch. 2. and being thereof lawfully convicted, shall forfeit to the king, for every month which he or she shall so forbear, twenty pounds."

11 Co. 63. *Sect. 7.* In the exposition hereof it hath been resolved, *First*, That this statute, by inflicting twenty pounds for a month's absence, dispenses not with the forfeiture of twelve pence given by 1 Eliz. c. 2. for the absence of one Sunday; for both may well stand together, and the twelve pence is immediately forfeited upon the absence of each particular day.

Lutw. 162, 163. *Sect. 8. Secondly*, That these words, "being thereof lawfully convicted," are no more than the law would have implied, if they had not been expressed, and therefore operate nothing. From whence it follows, that they neither cause the party to forfeit any thing by a conviction, unless judgment be given thereon, nor restrain the forfeiture to such offences only, as are committed after a previous conviction, inasmuch as they mean no more than what the law provides of common right in every case, viz. That the party shall forfeit nothing till he be convicted.

11 Co. 58. 60. *Sect. 9. Thirdly*, That he who is condemned on demurrer, or *nihil dicit*, is sufficiently convicted within the act; for who-

EXER

ever is adjudged, is convict, though it follow not that every one, who is convict, is adjudged, &c.

Sett. 10. *Fourthly*, That one, who was sick for part of the time contained in an information upon this statute, shall not be at all excused by reason of such sickness, if it be proved that he was a recusant, both before and after; for it shall be intended that he obstinately forbore during that time. C. Jac. 529.

Sett. 11. *Fifthly*, That the time of a month, intended by the statute shall be computed not by the kalendar, but by the number of days, allowing 28 days to each, according to the common rule of expounding statutes, which speak generally of a month. Yel. 100. Eliz. 935. 2 R. Abr. 512. Cawley 61.

A feme covert is within the 1 & 23 of Eliz. and an information lies against the husband. C. Jac. 529. — *See* *vide* Sav. 25.

Sett. 12. Thirdly, The forfeiture of twenty pounds for the absence of every month after a conviction, depends upon 28th commonly called 29 Eliz. c. 6. f. 4. & 3 Jac. 1. c. 4. f. 8. 3. by which it is enacted, "That every offender being convicted of not coming to church, contrary to the purport of the statutes above mentioned, shall pay twenty pounds for every month after such conviction, until he shall conform himself, and come to church." 3 Lev. 537. Lut. 203. 1117. 2 Mod. 240. 1 And. 294. 11 Co. 63. 3 Keb. 742. 1 Ver. 143. 2 Ver. 711. L. Ray. 77. 210. 343. 571. 382. 1224.

Sett. 13. As to the second branch of this head, *viz.* What forfeiture of lands and goods such offenders are liable to, the same depends also upon 29 Eliz. c. 6. f. 4. and 3 Jac. 1. c. 4. f. 8, 9. by which it is enacted, "That if the offender shall make default of payment of the twenty pounds, both for every month contained in the conviction, and also for every month subsequent, during which he shall not conform himself to the church, the king shall take, seize and enjoy all his goods, and two parts of his hereditaments, leases and farms, leaving the third part only of the same hereditaments, leases and farms, to and for the maintenance and relief of the same offender, his wife, children, and family, notwithstanding any prior conveyance thereof made by such offender, with power of revocation, or to the use of himself or his family." 29 Eliz. c. 6. f. 8.

Also by the said statute of 3 Jac. 1. c. 4. f. 11. "The king may refuse the penalty of twenty pounds a month, though it be tendered according to law, and thereupon seize two parts of all the hereditaments, leases and farms, which at the time of such seizure shall be, or afterwards shall come to any such offender, or to any other to his use, or in trust for him or at his disposition, or whereby or in consideration whereof he or his family shall be relieved, maintained or kept, leaving unto him his chief mansion-house, as part of his third part."

Sett. 14. In the construction of these statutes the following points have been resolved. First, That the king by making his election given him by 3 Jac. 1. to seize the offender's heredi- 1 Jones 24, 25. Cawl. 171, 172.

taments, &c. waves the benefit of the twenty pounds a month, and the power of seizing the offender's goods.

12 Co. 1, 2.
1 Leon. 98.
1 Roll. 7.

Señ. 15. Secondly, That a recognizance or bond taken by such offenders, either in their own names or in the names of others to their use, are within the statute of the 29th of Elizabeth. For the words thereof to this purpose, are "That the king shall take, seize, and enjoy all the goods, &c." which in an act of parliament will include the whole personal estate; and though a *chose in action* cannot properly be said to be taken or seized, yet may it properly enough be said to be enjoyed.

Owen 37.
1 Leon. 97.
Cawl. 107.

Señ. 16. Thirdly, That no copyhold lands are within 29 Eliz. (and by the same reason it seemeth that they are not within 3 Jac. 1.) in respect of the prejudice which would accrue to the lord by the loss of his services, &c.

C. Eliz. 845.
2 Roll. 25.
Palm. 41.
W. Jones 24.

Señ. 17. Fourthly, That the profits of the land seized by the king by force of 29 Eliz. for the non-payment of the twenty pounds a month, ought not to be applied to the satisfaction thereof, but that the lands ought to remain in the king's hands by way of pledge, till the whole forfeiture be paid some other way. But this construction of the statute seeming over severe, it was provided by 3 Jac. 1. c. 4. s. 5. "That the profits of the said lands should go towards the satisfaction of the twenty pounds."

Lane 105, 106.
Cawl. 169.
12 Co. 1. 2.

Señ. 18. It hath been questioned, whether an estate conveyed by another in trust for a recusant, be liable to be seized by force of the said statute of 29 Eliz. because it expressly avoids such conveyances only as are made by the recusant himself *to his own use*, &c. And perhaps if it shall plainly appear, that an estate is settled *bona fide* in trust for a recusant, by some friend of his, upon some other view, and not merely with an intent to evade the statute, it may be reasonable to exempt such a conveyance out of the meaning of it; however it is clear from the express words of 3 Jac. 1. c. 4. s. 11. "That the king, upon his waving the forfeiture of the twenty pounds a month, may seize two parts of all the hereditaments, &c. which shall come to any such offenders, or to others to their use, or in trust for them:" Also it is said, that the king may seize an estate, which is granted to a recusant in trust for another; and it is certain that the statute has made no express provision for the *cestui que trust*.

Lane 39.

As to the second general head of this chapter, *viz.* in what manner offenders of this nature are to be proceeded against for the forfeitures above mentioned, I shall consider, First How they are to be proceeded against for the said forfeitures of money. Secondly, In what manner for the said forfeitures of lands and goods.—As to the prosecution for the said forfeitures of money, I shall shew 1. How they are to be proceeded against for the said forfeiture of twelve pence for the absence of every Sunday, &c. and 2. In what manner

for the said forfeiture of twenty pounds for the absence of every month contained in a conviction, and 3. In what manner for the said forfeiture of twenty pounds for the absence of every month after a conviction.

Sec. 19. And first, as to the recovery of the said forfeiture of twelve pence for the absence of every Sunday. It was enacted by 1 Eliz. c. 2. "That the same should be levied by the church-wardens of the parish where such offence should be done, to the use of the poor of the same parish, of the goods, lands, and tenements of such offenders, by way of distress:" But this being defective in not shewing by whom, or in what manner such offenders should be convicted, or by whom the warrant for levying the said forfeiture should be granted, it was farther enacted by 3 Jac. 1. c. 4. s. 27. "That it shall be lawful for any one justice of the peace of the limit, division or liberty, wherein the said party shall dwell, upon the confession of the party, or the oath of one witness, to call the said party before him, and if he shall not make a sufficient excuse, and due proof thereof, to the satisfaction of the said justice of peace, that it shall be lawful for the said justice of peace to make a warrant to the church-warden of the said parish, where the said party shall dwell, to levy twelve pence for every such default, by distress and sale of the offender's goods, rendering the overplus to the said offender; and that in default of such distress, it shall be lawful for the said justice of peace to commit every such offender to prison, until the said forfeiture shall be paid, which shall be employed to the use of the poor of the parish, wherein the offender shall be resident or abiding at the time of the offence."

Sec. 20. As to the second point, viz. In what manner the said offenders are to be proceeded against for the said forfeiture of twenty pounds for the absence of every month contained in a conviction, I shall consider. First, In what manner the same may be recovered at the suit of the king. Secondly, In what manner at the suit of an informer.—And first, as to the recovery hereof at the king's suit, I shall consider, 1. In what manner it may be recovered at the king's suit by way of indictment, 2. In what manner by way of action or information.

Sec. 21. And first, as to the recovery hereof at the suit of the king by way of indictment, it was enacted by 23 Eliz. c. 1. s. 9. "That the justices of oyer, assize, gaol-delivery, and quarter sessions of the peace, might enquire of and determine these offences, within one year and a day:" *1 Roll. 94. 11 Co. 63. Cawt. 66, 67. 82, 83.* *23 Eliz. c. 6. s. 2. it was ordained, "That all such should be in the King's Bench, or at the assizes, gaol-delivery, and not elsewhere:"* However by
C4
3 Jac.

3 Jac. 1. c. 4. s. 7. the jurisdiction of the sessions is revived.

Precedent Lut.
203, 1101.

Sec. 22. Also it is farther enacted by 29 Eliz. c. 6. s. 5. and 3 Jac. 1. c. 4. s. 7. "That upon an indictment, at the assizes, gaol-delivery, or general sessions of the peace, proclamation shall be made that the offender render himself to the sheriff before the next assizes, gaol-delivery or sessions; and that if he shall not then appear of record, upon such default recorded, the same shall be a conviction in law, as if a trial by verdict on the indictment had been recorded." And by s. 9. "Every such conviction shall be certified into the Exchequer, &c."

Salk. 145.

1 Vern. 355.
Ray. 434.

Sec. 23. In the construction hereof it hath been resolved, *First*, That such a conviction shall not be looked on as a judgment; for the words are, "It shall be a conviction in law, as if a trial, &c. had been recorded:" And consequently that it cannot be reversed by writ of error, which cannot be brought on any record, which is not a judgment, and therefore that the party has no other remedy against an insufficient conviction, but to remove it into the Exchequer, and quash it there. Also upon the same ground it has been holden, that a forfeiture due to the king, by force of such a conviction, shall not be taken to be within the exception of a general pardon, which excepts all forfeitures, &c. converted to a debt by judgment.

Vide Salk. 145.
11 Co. 65.
Inst. s. 42.

Palm. 40, 41.
Bridg. 123.
3 Lev. 333.
Lut. 1117.

Sec. 24. Secondly, That if the proclamation do not pursue the statute, as if it appoint that the body shall be rendered at next sessions, &c. whereas by the statute it ought to order a render to the sheriff, and that before the next sessions, the conviction is insufficient.

Cawley 164.
Pop. 29.
Kecilw. 18c.

Sec. 25. Thirdly, That an actual personal appearance of the defendant at the next sessions, &c. will no way avail him, unless the same be entered of record.

Heb. 205.

Sec. 26. It hath been holden, That a man cannot be convicted by force of this statute upon a default on a proclamation, &c. in the King's Bench; because this court is not mentioned in the statute.—But perhaps this opinion may justly be questioned, because the court of King's Bench being the supreme court of assize, and gaol delivery, &c. in the county where it sits, it seems that a statute, by giving any power to the courts of assize or gaol-delivery, does impliedly give the same to the court of King's Bench, unless it have some restrictive words to the contrary.

Sum. 156.
C. Car. 465.
2 Lev. 179.
2 Mod. 128,
129.

Sec. 27. If the defendant do appear, there is no doubt but that the proceedings ought to be according to the common course of law upon other indictments in all respects, except those which are within the restraint of 3 Jac. 1. c. 4. s. 16, 17. by which it is enacted, "That no such indictment, nor any proclamation, outlawry or other proceeding thereupon, shall at any time hereafter be avoided, discharged or reversed"

"reversed, by reason of any default in form or lack of form
 "or other defect whatsoever, (other than by direct traverse
 "to the point of not coming to church, &c.) but the same
 "indictment shall stand in force and be proceeded upon; any
 "such default of form, or other defect whatsoever notwith-
 "standing, unless the party so indicted shall conform, &c."

C. Car. 504.
 Raym. 434.

Sett. 28. However it hath been resolved, *First*, That the party is only restrained from taking advantage of defects in the record itself, and that he may plead any collateral matter, as a pardon, or *autrefois convict*, &c.

11 Co. 59. 65.
 1 Roll. 95.
 C. Jac. 430.
 482.

Sett. 29. *Secondly*, That he may even reverse a judgment after verdict for any such defect in the record itself, as tends to the king's prejudice, as the omission of a *capiat*, &c. And that he may reverse an outlawry for any common defect, upon putting in bail, and traversing the indictment as to the point of not coming to church, which is very agreeable to the purport of the whole clause, the latter part whereof seems manifestly to qualify the generality of the former.

C. Car. 504.
 505.
 Show. 309.
 5 Mod. 141.
 3 Keb. 591.

Sett. 30. *Secondly*, As to the recovery of the said forfeiture by way of action or information at the king's suit, it was enacted by 35 Eliz. c. 1. s. 10. "That all and every the
 "said pains, duties, forfeitures, and payments, shall and
 "may be recovered and levied to her majesty's use, by action
 "of debt, bill, plaint, information or otherwise, in any of
 "the courts commonly called the King's Bench, Common
 "Pleas, or Exchequer, in such sort and in all respects, as by
 "the ordinary course of the common laws of this realm, any
 "other debt due by any such person in any other case should
 "or may be recovered or levied, wherein no esloin, protec-
 "tion or wager of law shall be admitted or allowed."

Sett. 31. It is said, That the principal end of making this clause, was to enable the queen to proceed against the husband for the recusancy of his wife, which she could not do by virtue of any of the former statutes, by which she had no other way of proceeding but by indictment, and consequently could not charge the husband for the forfeiture of the wife, because she could not make him a party to the suit, as she may by force of this statute. However, it is said, that on a conviction of the wife upon an indictment, the lands and leases, which the husband has in her right, may be seized by the Exchequer-process.

11 Co. 61. 62.
 Vide sup. c. 1.
 s. 13.

C. Jac. 482.
 Billgm. 122.
 seems contrary.

Sett. 32. As to the second particular, *viz.* In what manner an informer may proceed for the forfeitures aforesaid. It is enacted by 23 Eliz. c. 1. s. 11. "That all forfeitures of
 "any sums of money limited by that act, shall be divided into
 "three equal parts, whereof one third shall be to the queen,
 "to her own use, one other third to the queen, for the relief
 "of the poor in the parish where the offence shall be com-
 "mitted to be delivered by the warrant of the principal
 "officers in the receipt of the Exchequer, without further
 "warrant

2 Leon. 167. &
 29 Eliz. 6. 67.

“warrant from her Majesty; and the other third to such
 “person as will sue for the same, in any court of record, by
 “action of debt, bill, plaint, or information, in which suit
 “no essoin, &c. shall be allowed; and that every person
 “which shall forfeit any sums of money by virtue of that
 “act, and shall not be able, or shall fail to pay the same
 “within three months after judgment thereof given, shall be
 “committed to prison, there to remain until he have paid
 “the same sums, or conform himself to go to church, and
 “there do as is aforesaid.”

11 Co. 58.
 See 3 & 6 Par.
 1 Roll. 89.

11 Co. 58.

1 And. 139.
 140.
 B. 2. c. 26.
 f. 76.

Sup. f. 13. 33.

11 Co. 61, 62.
 1 Roll. 92, 93.

Hob. 205.
 Con. 11 Co. 61.

Sec. 33. It has been objected, that this cause shall not extend to the said forfeiture of twenty pounds a month for not coming to church, because the same is by the former part of this statute given expressly to the queen, whereas the forfeitures for saying or hearing mass, and keeping an unlicensed school-master, are inflicted by the same statute indefinitely, and not expressly given to any one. From which it is argued, that this latter clause of distribution ought only to be applied to the said indefinite clauses, and not to take from the queen any part of that, which was expressly given her before. Yet it has been answered and resolved, that it shall equally extend to all; for the limitation of the forfeiture to the queen is mere surplus, and no more than the law would have implied, *Et expressio eorum, quæ tacite insunt, nihil operatur.*

Sec. 34. Also it has been resolved, that an informer may sue, not only for the third part which belongs to him, but for the whole penalty in the behalf of himself and the king, and that the judgment shall be that they shall recover, &c.

Sec. 35. Also it has been adjudged, that neither the above mentioned clause of 29 Eliz. c. 6. which orders, That all convictions upon 23 Eliz. shall be certified into the Exchequer, and also that the offender shall pay to the queen twenty pounds for every month contained in the indictment, &c. nor the said clause in the 35 Eliz. c. 1. by which it is enacted, That all the said pains, &c. shall be recovered to the queen's use, do take away the suit of the informer, against one not proceeded against by the king, or the third part of the penalty given him by 23 Eliz. For the plain purport of both these acts is to further the punishment of recusants, and therefore, inasmuch as they are in the affirmative, and consistent with 23 Eliz. they shall not be construed to abrogate any part of it.

Sec. 36. Moreover it is manifest, that 29 Eliz. c. 6. extends only to the king's suit by indictment, for the word indictment is mentioned almost in every clause.

Sec. 37. And it also follows from hence, that the second paragraph of the said statute of 29 Eliz. which enacts, That convictions for this offence shall be only at assizes, gaol-delivery, or the King's Bench, restrains only convictions upon indictments, and consequently does not any way impeach the

the jurisdiction of the Common Pleas or Exchequer, as to informations, &c.

Sec. 38. It seems the better opinion upon comparing all the books together, which differ much from one another both in stating the cases, and giving the reasons of the judgments relating to this matter, that a conviction at the king's suit, whether strictly regular or erroneous, may be pleaded to a suit by an informer, because, while it stands in force, it makes the party liable to the forfeiture of twenty pounds a month, and no one ought to be punished twice for the same offence. But it hath been resolved, that an erroneous, and strongly holden, that a regular conviction, by proclamation cannot be pleaded to a new suit by the king, because such a conviction is of no greater effect than a conviction by verdict, and consequently the king may waive it and begin anew.

Sec. 39. But it seems very doubtful, whether the conviction of a feme covert upon an indictment can be pleaded to an information against her and her husband, because the husband is not liable to pay the forfeiture recovered upon an indictment.

Sec. 40. It seems that the ordinary method of recovering the said forfeiture of twenty pounds for every month contained in a conviction, either at the suit of the king, or of an informer, may sufficiently appear from what has been already said; but there is an extraordinary remedy provided by the same statute of 29 Eliz. c. 6. to enforce the party to take care of the payment of the forfeiture of the twenty pounds for every month contained in an indictment, whereon he shall be convicted, by making his lands and goods liable to be seized by the king for the non-payment thereof into the Exchequer, upon such of the terms of Easter or Michaelmas, as shall be next after his conviction. But this extends not to a conviction by way of action, or information, as more fully appears from the two next sections.

Sec. 41. As to the third point, *viz.* in what manner the forfeiture of twenty pounds for the absence of every month after a conviction is to be recovered. It seems needless to enquire how far it may be recovered by an action or information for it at the king's suit, inasmuch as the said statutes of 29 Eliz. c. 6. & 3 Jac. 1. have made a most effectual provision for the payment of it, by expressly enacting, "That every such offender, being once convicted, shall for every month after such conviction, without any other indictment or conviction, pay into the Exchequer twice in the year, *viz.* in every Easter and Michaelmas term, as much as shall then remain unpaid, after the rate of twenty pounds for every month after a conviction, and that for a default herein the king may seize all the goods, and two parts of the hereditaments of such an offender, &c."

11 Co. 59. 65.
B. 2. c. 26. f. 63.
Lutw. 208.
1 Roll. 93.
C. Jac. 481.
Noy. 117.
Lane 60.
Palm. 39, 40, 41.
2 Roll. 108.
Bridg. 127.

C. Jac. 482.
Bridg. 120. 122.
2 Roll. 108.
Vide sup. c. 1.
f. 13.
1 Bac. Abr. 294.

Sec. 24. But it seemeth that these clauses extend not to any conviction upon an information, or action, &c. but only to a conviction upon an indictment; for there is no other suit referred to besides that of indictment. Also it is said, that the said clauses extend to no convictions by verdict or otherwise, unless judgment be given thereon; because, till then nothing is forfeited. And from the same ground it seems to follow, that they would not have extended to a conviction by default upon proclamation, if there had been no other words in the statute to this purpose, than those by which it is enacted, "That such a default recorded shall be as sufficient a conviction in law of the said offence, whereof the party standeth indicted, as if upon the same indictment a trial by verdict thereupon had proceeded and been recorded," which words of themselves can by no means make such a conviction amount to a judgment after verdict, without which there can be no forfeiture upon any other conviction; and therefore it seemeth that the forfeiture caused by such a conviction must depend upon the other clauses of the said statutes, and the constant tenor of our law books, which seem to suppose that a person so convicted shall be liable to the said forfeitures, as much as one, against whom a judgment is expressly given.

*See 29 El. 6. f. 6.
3 Jac. 1. c. 4. f. 7, 8, 9.
Caw. 103, 104.*

Sec. 43. As to the second general branch of this head, *viz.* In what manner offenders of this nature are to be prosecuted for the forfeiture of lands or goods. It appeareth from the 13th, 14th, 15th, 17th, 18th, 40th and 41st sections of this chapter, that the king hath his election either to seize all the goods and two parts of the hereditaments and leases of the offender upon his making default in the payment of twenty pounds, both for every month contained in an indictment, whereon he shall be convicted, and also for every month subsequent, or else to refuse the said penalty of twenty pounds a month, and thereupon to seize two parts of the hereditaments and leases of the offender.

Sec. 44. It also appeareth from what hath been said in the forty-second section of this chapter, that the king hath this advantage of seizing the lands and goods of the offender upon no other conviction, but such as followeth an indictment, nor even upon such a conviction without a judgment, unless it be caused by a default upon a proclamation. Therefore I shall add no more to this head, except these two following observations:

*2 Ind. 573.
8 Co. 160.
Plow. 486.*

Sec. 45. *First,* That the king cannot seize the lands till it appears by the return of an inquisition to that purpose to be awarded, of what lands, &c. the offender was seized; because the king's title to lands ought always to appear of record.

Sec.

Seet. 46. Secondly, That the king according to the better opinion, may seize the goods, but not grant them over, without such an inquisition.

B. Cor. 2. 14.
25. 45. 47. 55.
60.
1 Rol. 7.
2 R. Abr. 184.

Seet. 47. As to the third general head of this chapter, *viz.* What disabilities and other inconveniencies, offenders of this kind are liable unto, it is enacted by 3 Jac. 1. c. 5. s. 8. "That no recusant convict shall practise either the common
"or civil law, or physick, or use the trade of an apothecary,
"or be judge or minister of any court, or bear any office in
"camp, troop or company of soldiers, or in any ship, or
"fortress, but shall be utterly disabled for the same, and forfeit for every such offence one hundred pounds."

Seet. 48. Also it is further enacted by the said statute of 3 Jac. 1. c. 5. s. 22. "That such recusants, as shall be convicted at the time of the death of any testator, or at the
"time of granting of any administration shall be disabled to
"be executors or administrators; and that no such persons
"shall be guardians to any child, &c."

Seet. 49. And it is enacted by 23 Eliz. c. 1. "That
"every person forbearing the church twelve months, shall on
"certificate thereof into the King's Bench by the ordinary,
"a justice of assize and gaol-delivery, or a justice of peace
"of the county where such offender shall dwell or be, be
"bound with two sufficient sureties in the sum of two hundred pounds at the least to the good behaviour, and so continue bound until such offender shall conform himself, &c."

Seet. 50. As to the fourth general head of this chapter, *viz.* by what means offenders of this nature may be discharged from the said forfeitures, &c. it is enacted by 23 Eliz. c. 1. s. 10. "That every person guilty of the above-mentioned offences, who shall, before he be thereof indicted, or at his
"arraignment or trial before judgment, submit and conform
"himself before the bishop of the diocese where he shall be
"resident, or before the justices where he shall be indicted,
"arraigned, or tried, (having not before made like submission at any his trial, being indicted for his first like offence,) shall upon his recognition of such submission in open
"sittings, or sessions of the county where such person shall be
"resident, be discharged of all and every the said offences
"against the said statute, &c."

Seet. 51. Also it is enacted by 29 Eliz. c. 6. s. 6. "That
"whosoever any such offender shall make submission; and
"become conformable, according to the form limited by the
"above mentioned statute of 23 Eliz. c. 1. or shall fortune
"to die, that then no forfeiture of twenty pounds for any
"month, or seizure of the lands of the same offender, from
"and after such submission and conformity, or death, and
"full satisfaction of all the arrearages of twenty pounds
"monthly,

“ monthly, before such seizure due or payable, shall ensue,
 “ or be continued against such offender, so long as the same
 “ person shall continue in coming to divine service, accord-
 “ ing to the intent of the said statute.”

Sett. 52. But this statute being thought not to give suffi-
 cient encouragement to such persons to conform to the church,
 because by the most favourable construction that could be
 made, it still obliged them to pay such debts as were due to
 the king by force of a judgment, it was enacted by 1. Jac. 1.
 c. 4. s. 2. “ That a recusant, conforming himself according
 “ to the meaning of the above mentioned statutes, &c. shall,
 “ during such conformity, be discharged of all penalties, which
 “ he might otherwise sustain by reason of his recusancy.”

Sett. 53. And it hath been resolved, that such conformity
 may, by force of this statute, be pleaded, as well to the suit of
 an informer as to that of the king; and that after judgment
 it will be a good ground for an *audita querela* against an
 informer; and also may be pleaded against the king before
 execution awarded.

Sett. 54. However, there seems to be no remedy for
 such a person to get a restitution of such of the profits of his
 lands, as have been actually taken by the king.

Sett. 55. It seemed very doubtful, before 1 Jac. 1. c. 4.
 how far the lands of an heir were chargeable with the for-
 feitures incurred by his ancestor in respect of his recusancy;
 but this seems to be for the most part cleared by the 3d,
 4th and 5th paragraphs of that statute, by which it is enacted,
 “ That the heir, if he be no recusant, or were such, and
 “ conform, shall be freed from all penalties happening upon
 “ him by reason of his ancestor’s recusancy, unless the two
 “ parts of the lands were seized by the king in the ancestor’s
 “ life, in which case they shall continue in the king’s hands
 “ till the whole debt shall be levied. But it is farther en-
 “ acted, that the king shall not extend the other third part
 “ of the lands for the said penalty.”

Sett. 56. It seems by the manifest purport of this statute,
 that the heir of a recusant, being also a recusant himself, has
 no remedy, but by conforming, to free his fee-simple lands
 from any of the forfeitures incurred by the conviction of
 his ancestor, whether the lands were seized in the an-
 cestor’s life or not.

However it is said, that the lands in fee-tail, which
 he claims from such ancestor, is no way chargeable
 after the death of the ancestor, with any forfeitures upon
 a conviction by proclamation (which has no greater effect
 than a verdict recorded) but only with such, as are due
 upon a judgment; which as it is agreed, charge an heir in
 tail by force of 33 Hen. 8. c. 39. s. 29. which makes an heir
 chargeable with the debts of his ancestor by judgement, re-
 cognizance, obligation, or other specialty. But perhaps,
 the authority of those opinions may justly be questioned.

For

1 Roll. 94.

Raym. 327,
 465.

2 Jon. 187.

1 Mod. 213.

1 Roll. 95.

2 Bulst. 324.

Savil. 130.

2 Show. 331.

Lane 92, 93.

106.

Cawley 109.

110.

Moor 523.

1 Roll. 94.

C. Eliz. 846.

Cawl. 109, 110,

150, 151, 152.

For though a conviction by proclamation amount not to a judgment, yet surely it cannot be inferior to an obligation. And, therefore, perhaps, the books cited in the margin are misreported in this particular, and the more proper distinction may be this; that an heir in tail is chargeable only with the forfeitures of those months, which are contained in the indictment itself, on which a judgment is afterwards given, or a conviction by proclamation recorded, and not for the months subsequent to such conviction, or proclamation, inasmuch as the first seem to be debts appearing of record, the latter not. And the same distinction seems applicable to such lands in tail of an heir who conforms, as were seized in the ancestor's life; but it is clear that such only of his lands as were so seized are in any case liable, whether he claim them in fee-simple or tail.

Vide sup. f. 30.

CHAPTER THE ELEVENTH.

OF THE OFFENCES OF SUFFERING OTHERS TO BE ABSENT FROM CHURCH.

HAVING shewn how far all persons in general are punishable for their own absence from the church, I am now to shew how far they may be punished for the absence of others; as to which it is enacted by 3 Jac. 1. c. 4. f. 32, 33, 34. "That whosoever shall retain or keep in his service, "see or livery, or shall willingly maintain, retain, relieve, "keep, or harbour, in his house, any servant, sojourner, or "stranger (except a father, or mother wanting, without "fraud, or covin, other habitation, or sufficient maintenance, "and also except a ward, or person committed to the custody "of another by authority) who shall not go to some church "or chapel, or usual place of common prayer, to hear divine service, but shall forbear the same for the space of "one month, &c. shall for every month, that he shall keep "such servant, &c. forfeit ten pounds."

4 Can. 52.
3 Burh. E. L.
220.

CHAPTER THE TWELFTH.

OF POPISH RECUSANCY.

AND now we are come to offences against the established church more immediately relating to those of the popish religion.

For the better understanding whereof I shall consider: First, The above mentioned offence of not coming to church, so far as it particularly concerns those of this persuasion. Secondly, The offence of saying or hearing mass, or other popish service. Thirdly, The offence of not making

making a declaration against popery. Fourthly, The offence of promoting or encouraging the popish religion.

Skin. 99.
Keb. 7.
3 Burn. E. L.
120.

And first as to the said offence of not coming to church, so far as it particularly concerns those of the popish religion; who in respect hereof are commonly called popish recusants. I shall consider; *First*, How far such recusants are punishable in their own persons. *Secondly*, How far they make others liable to be punished.

As to the first of these points, *viz.* How far such recusants are punishable in their own persons. It is to be observed, that they are not only liable to all the forfeitures and disabilities and other inconveniences mentioned in chap. 10. but also to many particular disabilities, restraints and forfeitures, and other inconveniences to which no others are liable.

First they are put under the following disabilities. 1. That of bringing an action. 2. That of presenting to a church. 3. That of bearing any public office, or charge. 4. That of claiming any part of a husband's personal estate. 5. That of claiming an estate by curtesy, or by way of dower, after a marriage against law.

Secondly, They are put under the following restraints. 1. From going above five miles from home. 2. From coming to court. 3. From keeping arms. 4. From coming within ten miles of London.

Thirdly, They are liable to the following forfeitures, 1. That of two parts of a jointure or dower. 2. That of twenty pounds for not receiving the sacrament yearly after conformity. 3. That of one hundred pounds for an unlawful marriage. 4. That of one hundred pounds for an omission of lawful baptism. 5. That of twenty pounds for an unlawful burial.

Lastly, They are subject to the following inconveniencies. 1. That their houses may be searched for reliques, whether they be men or women. 2. If they be women and married, that they may be committed, &c.

Secd. 1. As to the first of the said disabilities, *viz.* That of bringing an action. It is enacted by 3 Jac. I. c. 5. s. 11, 12. "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated, and as if such person had been so denounced and excommunicated according to the laws of this realm until he or she shall conform, &c. And that every person sued by such person so disabled, may plead the same in disabling of such plaintiff, as if he or she were excommunicated by sentence in the ecclesiastical court. Except the action of such recusant do concern some hereditament

11 Mod. 357,
366.

" or

“ or lease, which is not to be seized into the king’s hands ^{4 Comm. 55.}
“ by force of some law concerning recusancy.” ^{124.}

By 1 Jac. 1. c. 4. provided he conforms according to the meaning of the statutes of 23 Eliz. c. 1. and 23 Eliz. c. 6. he shall during such conformity, be discharged of all penalties, which he might otherwise sustain by reason of his recusancy;—For the pleading of which see Ray. 391. 2 Jones 287. Mod. 213.

Sec. 2. In the exposition hereof it hath been resolved, ^{Noy, 89.}
First, That the plea of such a conviction, like all other pleas ^{3 Lev. 208.}
in disability, ought to be pleaded before imparlance, and also ^{Latch. 176.}
to conclude with a demand if the plaintiff shall be answered. ^{Het. 18. Mod.}
^{Cases in L. & E.}
^{43. 381.}

Sec. 3. *Secondly,* That such plea ought also to shew be- ^{Noy, 89.}
fore what justices the conviction was, that the court may ^{Latch, 176.}
know where to send for a certificate thereof, if it be denied; ^{3 Lev. 333,}
and also that the record itself, or at least a certificate thereof, ^{234.}
ought to be immediately produced, according to the general
rule of the law, as to all dilatory pleas grounded upon records.

Sec. 4. *Thirdly.* That if after such a plea it be certified ^{Hell. 176.}
that the plaintiff hath conformed, and thereupon the defend-
ant be ordered to plead in chief, and then the plaintiff relapse
and be convicted again, the defendant cannot plead the same
in disability a second time.

Sec. 5. *Fourthly,* That it must appear either from the con- ^{2 Lut. 1117.}
viction itself, or by proper averments, that the plaintiff is ^{3 Lev. 333, 334,}
convicted of popish recusancy, because no recusants, except ^{11, 12.}
popish ones, are within the said clause; however that this is
sufficiently set forth by alledging that the plaintiff being
papalis recusans, was indicted and convicted *secundum formam*
statuti, &c.

Sec. 6. And some have gone so far as to hold, that all ^{2 Bul. 155, 156.}
popish recusants convicted may be taken up by the writ, *de* ^{The same point}
excommunicatis capiendo, and that they are not to be admitted ^{seems admitted,}
as competent witnesses in any cause; but this seems to be ^{1 St. Tr. 268.}
a construction over severe: for inasmuch as this, like all ^{3 St. Tr. 425.}
other penal statutes, ought to be construed strictly, and the ^{Cawley 216.}
words thereof are no more than, that such persons shall stand ^{Vide 1 Com.}
disabled, &c. as persons lawfully excommunicate, &c. and ^{Dig. 10. as to}
the purport thereof may be fully satisfied by the disability to ^{pleading, and}
bring any action, it seems to be too rigorous to carry them ^{4 Com. Dig. 65.}
farther. ^{as to the law in}
^{general upon}
^{this head.}

Sec. 7. As to the second of the said disabilities, *viz.* ^{5 Burn. L. L.}
That of presenting to a church, the same being at this day ^{252.}
extended by 12 Ann. c. 2. to all persons making profession
of the popish religion, I shall refer the reader, for the matters
relating to this head, to chap. 15. wherein is shewn how
penal it is, barely to profess the said religion; and I shall
only take notice in this place, that by 1 Will. & Mar. c. 26.
s. 4. “ If the trustee, mortgagee, or grantee of any avoidance
“ whereof the trust shall be for any popish recusant convicted, shall
Vol. I. D “ present

“ present without giving notice in writing of the avoidance, to the university, &c. within three months after the avoidance, he forfeits five hundred pounds.”

16 Geo. 2. c.
39. f. 3.
20 Geo. 2. c.
52. f. 56.

Sett. 8. As to the third of the said disabilities, viz. that of bearing any publick office or charge, it is enacted by 3 Jac. 1. c. 5. f. 9. “ That no popish recusant convict shall exercise any publick office or charge in the commonwealth, but shall be utterly disabled to exercise the same, by himself or his deputy.”

Sett. 9. It is observable, that this clause is more strongly penned than that which immediately precedes it, relating to all recusants in general, as to the following particulars: 1. That this extends to all public offices and charges in general, whereas the former extends only to those which are particularly enumerated. 2. That this expressly disables a popish recusant to exercise such an office by himself or his deputy, but the other says nothing at all of the exercise of an office by a deputy.

See also 7 J. 1.
ch. 6.

Sett. 10. As to the fourth of the said disabilities, viz. That of claiming any part of a husband's personal estate, it is enacted by 3 Jac. 1. c. 5. f. 10. “ That every woman, being a popish recusant convict (her husband not standing convicted of popish recusancy) which shall not conform herself and remain conform'd, but shall forbear to repair to some church or usual place of common prayer, and there hear divine service and sermon, if any then be, and receive the sacrament of the Lord's supper, according to the laws of this realm, by the space of one whole year next before the death of her said husband, shall not only be disabled to be executrix or administratrix of her said husband, but also to have or demand any part of her said husband's goods or chattels, by any law, custom or usage whatsoever.” And by 3 Jac. 1. c. 5. f. 13. “ Every woman is put under the like disability, being a popish recusant, who shall be married otherwise than according to the church of England.”

Vide the marriage acts 26
Geo. 2. c. 33.
and 21 Geo. 3.
c. 53.

Sett. 11. As to the fifth of the said disabilities, viz. that of claiming an estate by the courtesy, or by way of dower, &c. it is enacted by 3 Jac. 1. c. 5. f. 13. “ That every man who, being a popish recusant convict, shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the church of England, by a minister lawfully authorized, shall be disabled to have any estate, as tenant by the courtesy; and that every woman, being a popish recusant convict, who shall be married in other form than as aforesaid, shall be disabled to claim her dower or jointure, or widow's estate, &c.”

Sett.

Sett. 12. As to the first of the above mentioned restraints, viz. That from going above five miles from home, &c. it is enacted by 35 Eliz. c. 2. and 3 Jac. 1. c. 5. s. 6, 7. "That every popish recusant convict shall repair to his place of dwelling, &c. and not remove above five miles from thence; unless he be urged by process, &c. or have a licence from the privy council, &c. or under the hands and seals of four justices of peace, with the assent in writing of the lieutenant of the county, or of the bishop, &c. (every licence of which kind by justices of peace must express both the particular cause and the time for which it is given, and ought not to be granted without a previous oath of some reasonable cause,) under pain of forfeiting all his goods and hereditaments, (whether freehold or copyhold,) for his life, or of abjuring the realm, if he be not worth twenty marks a year, or forty pounds in goods, unless he recant before conviction, and also continue conformable."

3 Burn. E. li.
162. 165.

See Cawt. 128,
129, &c. 207,
208.

Sett. 13. Note, that the privy council may grant such licence without any special cause or oath, &c. but that the justices of peace cannot. And it hath been resolved, that in pleading a licence of justices of peace, you must expressly shew that it was made under their hands and seals, and also set forth the cause in particular for which it was granted, and the time for which it was limited, and that the party was sworn to the truth of such cause, &c.

C. Jac. 354.
1 Roll. 108.
Moor 836.

Sett. 14. It is said, that if the same person be both a justice of peace and a lieutenant, he cannot both join in a licence as justice of peace, and also give his assent as lieutenant, but can only act in one capacity.

C. Jac. 352.
1 Roll. 108.
Moor 836.

Sett. 15. It seems that the miles shall be computed according to the English manner, allowing 5280 foot, or 1760 yards to each mile, and that the same shall be reckoned not by strait lines, as a bird or arrow may fly, but according to the nearest and most usual way.

Cawt. 130, 131.
C. Eliz. 312.

Sett. 16. As to the second of the above mentioned restraints, viz. That which relates to the coming to court, it is enacted by 3 Jac. 1. c. 5. s. 2. "That no popish recusant convict shall come into the court or house where the king or his heir apparent shall be, unless he be commanded so to do by the king, upon pain of one hundred pounds, &c." And it is farther enacted by 30 Car. 2. st. 2. s. 5, 6. "That every popish recusant convict, who shall come advisedly into, or remain in the presence of the king and queen, or shall come into the court or house where they or any of them reside, shall be disabled to hold or execute any office or place of trust civil or military, or to sue in law or equity, or to be an executor, &c. or capable of any legacy or deed of gift, and shall forfeit for every wilful offence five hundred pounds, unless such person do within

“ the term next after such his coming or remaining, take the
 “ oaths of allegiance and supremacy, and make the declaration
 “ against transubstantiation and the invocation of saints, &c.
 “ in the court of chancery.”

Señ. 17. As to the third of the above mentioned restraints, viz. That which relates to the keeping of arms, it is enacted by 3 Jac. 1. c. 5. f. 27, 28, 29. “ That all such armour, “ gun-powder, and munition, of whatsoever kinds, as any “ popish recusant convict shall have in his own house or elsewhere, or in the possession of any other at his disposition, “ shall be taken from him by warrant of four justices of peace “ at their General or Quarter Sessions, (except such necessary “ weapons as shall be allowed him by the said four justices, “ for the defence of his person or house) and that the said “ armour, &c. so taken, shall be kept at the cost of such “ recusant, in such place as the said four justices at their “ said sessions shall appoint: and that if any such recusant having such armour, &c. or if any other person who “ shall have any such armour, &c. to the use of such recusant, shall refuse to discover to the said justices, or any “ of them, what armour he hath, or shall let or hinder the “ delivery thereof to any of the said justices, or to any other “ person authorized by their warrant to take the same, that “ then every person so offending shall forfeit his said armour, &c. and also be imprisoned for three months without bail, by warrant from any justices of peace of such “ county.” And it is further enacted, “ That notwithstanding the taking away such armour, &c. yet such recusant “ shall be charged with the maintaining of the same, and with “ the providing of a horse, &c. in such sort as others of his “ majesty’s subjects.” Also it is further enacted by 1 W. & M. c. 15. “ That no reputed papist refusing to make the “ said declaration against popery, mentioned in 30 Car. shall “ keep arms.” As it is set forth more at large. chap. 14. sect. 4.

Señ. 18. As to the fourth of the above mentioned restraints, viz. That which relates to the coming within ten miles of London, it is enacted by 3 Jac. 1. c. 5. f. 4, 5. “ That no popish recusant, &c. shall remain within the “ compass of ten miles of London, under pain of one hundred pounds, except such persons as, at the time of the “ said act, did use some trade, mystery, or manual occupation in London, &c. and such as shall have their only “ dwelling in London, &c.” Also reputed papists, refusing to make the declaration mentioned in the precedent sections, are to be removed from London, &c. by force of 1 Will. & Mar. c. 9. which is set forth more at large in chap. 14. sect. 3.

Stat. 19. As to the first of the above mentioned forfeitures, viz. That of two parts of a jointure or dower, it is enacted by 3 Jac. 1. c. 5. s. 10. "That every married woman, being a popish recusant convict, (her husband not standing convicted of popish recusancy) who shall not conform herself and remain conformed, but shall forbear to repair to some church or usual place of common prayer, and there to hear divine service and sermon, if any then be, and receive the sacrament of the Lord's supper, according to the laws of this realm, within one year next before the death of her said husband, shall forfeit to the king the profits of two parts of her jointure and dower of any hereditaments of her said husband, &c."

Stat. 20. As to the second of the above mentioned forfeitures, viz. That of twenty pounds, &c. for not receiving the sacrament yearly after conformity, it is enacted by 3 Jac. 1. c. 4. s. 2, 3. "That if any popish recusant convict, who hath conformed himself to the church, &c. shall not receive the sacrament in his own parish church, &c. within one year after his conformity, he shall forfeit twenty pounds, and for the second year forty pounds, and for every year after sixty pounds, &c."

Stat. 21. As to the third of the above mentioned forfeitures, viz. That of one hundred pounds for an unlawful marriage, it is enacted by 3 Jac. 1. c. 5. s. 13. "That every popish recusant convict, who shall be married to a woman who is no inheritrix, otherwise than according to the church of England, shall forfeit one hundred pounds."

Stat. 22. As to the fourth of the above mentioned forfeitures, viz. That of one hundred pounds for the omission of a lawful baptism, it is enacted by 3 Jac. 1. c. 5. s. 14. "That every popish recusant who shall not cause his or her child to be baptized, within one month after its birth, by a lawful minister, &c. shall forfeit one hundred pounds, &c."

Stat. 23. As to the fifth of the above mentioned forfeitures, viz. That of twenty pounds for an unlawful burial, it is enacted by 3 Jac. 1. c. 5. s. 15. "That if any popish recusant, not being excommunicate, shall be buried in any other place than in the church or churchyard, or not according to the ecclesiastical laws of this realm, the executors, &c. of such recusant, knowing the same, or the party that causeth him to be so buried, shall forfeit twenty pounds, &c."

Stat. 24. As to the inconvenience to which all such offenders are liable, viz. That of having their houses searched for reliques, &c. it is enacted by 3 Jac. 1. c. 5. s. 26. "That any two justices of peace, and all mayors, bailiffs, and

“ and chief officers of cities and towns corporate, in their
 “ respective jurisdictions, may search the house and lodgings
 “ of every popish recusant convict for popish books and re-
 “ liques; and that if any altar, pix, beads, pictures, or such
 “ like popish relique, or any popish book, be found in the
 “ custody of such person, as, in the opinion of the said jus-
 “ tices, &c. shall be unmeet for him or her to have or use, it
 “ shall be defaced and burnt, if it be meet to be burnt; and
 “ if it be a crucifix, or other relique of any price, the same
 “ shall be defaced at the General Quarter-Sessions in the
 “ county where it shall be found, and then restored to the
 “ owner.”

Stat. 25. As to the inconvenience to which such offenders, being femes covert are liable, viz. That of being committed, it is enacted by 7 Jac. 1. c. 6. s. 28. “ That if any married woman, being a popish recusant convict, shall not within three months after her conviction, conform herself, and repair to church and receive the sacrament, &c. she may be committed to prison by one of the privy council, or by the bishop, if she be a baroness; or if under that degree by two justices of peace, whereof one to be of the *Quorum*, there to remain till she perform, &c. unless the husband will pay to the king ten pounds a month for her offence, or else the third part of all his lands, &c. at the choice of the husband, &c.”

Stat. 26. And now I am to consider in the second place, how far such recusants make others liable to be punished; as to which it is to be observed, That the husband of a popish recusant convict is not only liable to the forfeiture of ten pounds a month for the absence of any of his servants from church, by force of 1 Jac. 1. which is set forth more at large in the foregoing chapter, but is also “ utterly disabled,” by the ninth paragraph of the said statute, “ to exercise any publick office or charge in the common-wealth by himself or by his deputy; (except such husband himself, and his children, which shall be above the age of nine years abiding with him, and his servants in the household, shall once every month at least, not having any reasonable excuse to the contrary, repair to some church or chapel usual for divine service, and there hear divine service; and the said husband, and such his children and servants, as are of meet age, receive the sacrament of the Lord’s supper, at such times as are limited by the laws of this realm, and do bring up his said children in the true religion.”)

Stat. 27. Also it is farther enacted by the said statute of 3 Jac. 1. c. 5. s. 26. “ That the house of one whose wife is a popish recusant convict, may be searched by any two justices of peace, &c. for popish books, &c.”

CHAPTER THE THIRTEENTH.

OF OFFENCES IN SAYING OR HEARING MASS, OR OTHER POPISH SERVICE.

AS to the offence in saying or hearing mass, it is enacted by 23 Eliz. c. 1. s. 4. "That every person, who shall say or sing mass, being thereof lawfully convicted, shall forfeit two hundred marks, and be committed to prison in the next gaol, there to remain by the space of one year, and from thenceforth till he have paid the said sum of two hundred marks; and that every person, who shall willingly hear mass, shall forfeit the sum of one hundred marks, and suffer a year's imprisonment." Dyer 203.
4 Comm. 56.
87. 115.
3 Jac. 1. ch. 5.
2 Show. 216.

Sec. 2. And it is enacted by 11 & 12 Will. 3. c. 4. s. 2, 3, 4, 5. "That every person, who shall apprehend any popish bishop, priest, or jesuit, and prosecute him to conviction for saying mass, or exercising any other part of the function of a popish bishop or priest, shall receive one hundred pounds of the sheriff, and that every such popish bishop, &c. (except, being a foreigner, he be entered in the secretary's office, and officiate only in the house of a foreign minister,) shall be adjudged to perpetual imprisonment."

† But by 18 Geo. 3. c. 60. it is enacted "That the above-mentioned clauses of 11 & 12 Will. 3. are repealed," provided, by s. 5. "that such popish bishop, priest, jesuit or schoolmaster shall have taken and subscribed the oath, (in the words as recited in the said statute of Geo. 3.) before he shall have been apprehended, or any prosecution commenced against him."

CHAPTER THE FOURTEENTH.

OF THE OFFENCE OF NOT MAKING A DECLARATION AGAINST POPERY.

THE offence of refusing to make a declaration against some of the principal doctrines of the popish religion puts all persons under the following restraints: First, From sitting in parliament. Secondly, From holding a place at court. Thirdly, From living within ten miles of London. Fourthly, From keeping arms. Fifthly, It puts them under a disability of presenting to a church.

A witness shall not be put to answer whether he is or is not a Papist. Dougl. 593.

Self. 1. As to the first of the above mentioned restraints, *viz.* That which relates to the sitting in parliament, it is enacted by 30 Car. 2. ft. 2. c. 1. "That no peer shall vote or make his proxy in the House of Peers, or sit there during any debate; and that no member of the House of Commons, shall vote or sit there during any debate after the Speaker is chosen, until such peer or member shall take the oaths of allegiance and supremacy, and make a declaration of his belief that there is no transubstantiation in the sacrament of the Lord's Supper; and that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous, &c. on pain that every such offender shall be adjudged a popish recusant convict, and disabled to hold or execute any office, &c. or from thenceforth to sit or vote in either house of parliament, to sue in law or equity, or to be guardian, executor or administrator, or capable of any legacy or deed of gift, and shall forfeit for every wilful offence five hundred pounds."

1 Geo. 1. c.
13.

Self. 2. As to the second of the above mentioned restraints, *viz.* That which relates to the holding a place at court, it is enacted by the said statute of 30 Car. 2. ft. 2. s. 9. 12, 13. "That every person who shall be a sworn servant to the king, shall take the said oaths, and make and subscribe the said declaration in chancery, the next term after he shall be so sworn a servant, &c. And that if any such person, neglecting so to do, shall advisedly come into or remain in the presence of the king or queen, or shall come into the court or house where they are or any of them reside, he shall suffer all the penalties expressed in the foregoing section, unless such person so coming into the king's presence, &c. shall first have licence so to do, by warrant under the hands and seals of six privy counsellors, by order of the privy council, upon some urgent occasion therein to be expressed, which licence shall not exceed ten days, and shall be first filed, &c. in the petty-bag office, for any body to view without fee, &c. and no person be licensed for above thirty days in one year."

This clause is
repealed by
2 Geo. 2. c. 31.
s. 9.

Self. 3. As to the third of the above mentioned restraints, *viz.* That which relates to the living within ten miles of London, it is enacted by 1 Will. and Mar. c. 9. "That every justice of peace in London and Westminster, and within ten miles thereof, shall cause to be arrested, and brought before him all reputed Papists (except foreigners, being merchants, or menial servants to some ambassador or public agent, and except all such as used some trade, mystery, or some manual occupation at the time of the said act, in London, &c. and also except all such persons as had

3 Geo. 2. c. 22. s.
23.

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41

“ had their dwelling in London, &c. within six months before the thirteenth of February 1688, and no dwelling elsewhere, and certified their names to the sessions before the first of August, 1689) and that every such justice shall tender the said declaration to every such person, and that every such person refusing the same, and afterwards remaining in London, &c. or within ten miles thereof, or being certified to the King’s Bench or Quarter Sessions, at the next term or sessions, as having refused to make the said declaration, and neglecting to make the same in such court, shall suffer as a Popish recusant convict, &c.”

Sec. 4. As to the fourth of the above mentioned restraints, viz. That which relates to the keeping arms, it is enacted by 1 Will. and Mar. c. 15. “ That any two justices of the peace may and ought to tender the said declaration to any person whom they shall know or suspect, or have information of, as being a Papist, or suspected to be such; and that no such person so required, and not making and subscribing the said declaration, or not appearing before the said justices upon notice to him given, or left at his usual abode, by one authorized by warrant under the hands and seals of the said justices, shall keep any arms or ammunition, or horse above the value of five pounds, in his own possession, or in the possession of any other person to his use (other than such necessary weapons, as shall be allowed him by the Quarter-Sessions for the defence of his house or person) and that any two justices of peace, by warrant under their hands and seals, may authorize any person in the day time, with the assistance of the constable or his deputy or the tithing-man, to search for all such arms, &c. and horses, and seize them to the king’s use; and that the said justices shall deliver the said arms and ammunition at the next Quarter Sessions in open court; and that whoever shall conceal, &c. or shall be aiding to the concealing any such arms or horses, shall be committed to the common goal, by warrant under the hands and seals of any two justices of peace, and also forfeit treble the value; and that those who discover any such arms or ammunition, so as the same may be seized, shall have the full value thereof, to be awarded to them by the sessions, &c. and that such refusers of the said declaration, &c. shall be discharged whenever they shall make the same.”

See ch. 12. §. 12.

Sec. 5. As to the above mentioned disability of presenting to a church, it is enacted by 1 Will. and Mar. c. 26. That whoever shall refuse to make the said declaration upon such a tender thereof as is prescribed by the said act, shall be disabled to present to any benefice, &c. but it seems needless to set forth the clause of the said statute relating to this mat-

ter

By 4 Geo. 3.
c. 2. s. 57. Pa-
pists are made
liable to pay
double land tax,
if they do not
not conform in

ter at large in this place, inasmuch, as by 12 Annæ, c. 14.
All persons whatsoever making profession of the Popish re-
ligion are under the like disability, as will appear from ch.
15. sect. 6, 7, &c.
the manner directed by the act.

CHAPTER THE FIFTEENTH.

OF OFFENCES IN PROMOTING OR EN- COURAGING THE POPISH RELIGION.

1 Comm. 457.
4 Comm. 55.
115.

OFFENCES in promoting or encouraging the Popish
religion seem to be reducible to the following heads;
1. Giving or receiving Popish education. 2. Professing the
Popish religion. 3. Buying or selling Popish books.

For the effect
and consequence
of a foreign
education in a
popish seminary.
Vide Str. 318.
Comyns 207.

Andr. 104.
Lucas 113.
356. 406.
10 Mod. 113.

Keb. 263.
Vide 3 Bac.
Abr. 789. and
the cases, &c.
there cited.

Sect. 1. The first offence of this kind, viz. That of giv-
ing or receiving Popish education depends upon several sta-
tutes; and first it is enacted by 1 Jac. 1. c. 4. s. 6. 7. "That
" if any person or persons under the king's obedience shall
" go or send, or cause to be sent, any child or any other
" person under their or any of their government, beyond the
" seas, out of the king's obedience, to the intent to enter
" into, or reside in, or repair to any college, &c. of any
" Popish order, profession or calling to be instructed, per-
" suaded or strengthened in the Popish religion, or in any
" sort to profess the same, every such person so sending such
" child, &c. shall forfeit 100l. and every such person, so
" passing or being sent, &c. shall in respect of him or herself
" only, and not in respect of any of his heirs or posterity,
" be disabled to inherit, purchase, take, have or enjoy, any
" profits, hereditaments, chattels, debts, legacies or sums of
" money, &c. whatsoever: and that all estates, terms,
" and other interests whatsoever to be made, suffered or
" done, to the use or behoof of any such person, or upon
" any trust or confidence, mediately or immediately to or
" for the benefit or relief of any such person, shall be ut-
" terly void."

Sect. 2. And it is farther enacted by 3 Jac. 1. c. 5. s. 16.
" That if the children of any subject within the realm (the
" said children not being soldiers, mariners, merchants, or
" their apprentices or factors) shall be sent or go beyond
" sea, to prevent their good education in England, or for
" any other cause, without the licence of the king or six of
" his privy council (whereof the principal secretary to be
" one) under their hands and seals, that then every such
" child

“ child shall take no benefit by any gift, conveyance, descent,
 “ devise or otherwise of or to any hereditament or chattel,
 “ till such child being of the age of eighteen years or above,
 “ take the oath of obedience before some justice of peace of
 “ the county, liberty, or limit, where the parent of such
 “ child did and shall inhabit: and that in the mean time the
 “ next of kin to such child, who shall be no Popish recusant,
 “ shall have the said hereditaments, &c. so given, &c. until
 “ such child shall conform, &c. and take the said oath and
 “ receive the sacrament; and that after such conformity, &c.
 “ he who hath received the profits of the said hereditaments,
 “ &c. shall account for the same, and in reasonable time
 “ make payment thereof, and restore the value of the said
 “ goods, &c. And that whoever shall send such child over
 “ seas, shall forfeit one hundred pounds.”

Vide 11 & 12
 Will. 3. c. 4.
 18 Geo. 3. ch.
 60.

Sett. 3. Also it is enacted by 3 Car. 1. c. 2. “ That if
 “ any person under the obedience of the king shall go, or
 “ shall convey or send, or cause to be sent or conveyed, any
 “ person out of the king’s dominions, into any parts beyond
 “ the seas, out of the king’s obedience, to the intent to
 “ enter into, or be resident or trained up in, any priory,
 “ abbey, nunnery, Popish university, college or school, or
 “ house of Jesuits, priests, or in a private Popish family,
 “ and shall be there by any Popish person instructed, per-
 “ swaded or strengthened in the Popish religion in any
 “ sort to profess the same, or shall convey or send, or
 “ cause to be conveyed or sent, any thing towards the
 “ maintenance of any person so going or sent, and trained
 “ and instructed, as is aforesaid, or under the colour of any
 “ charity towards the relief of any priory, &c. or religious
 “ house whatsoever; every person so sending, &c. any such
 “ person or thing, and every person passing or sent, being
 “ thereof convicted, &c. shall be disabled to prosecute any
 “ suit in law or equity, or to be executor or administrator to
 “ any person, be capable of any legacy or deed of gift, or to
 “ bear any office within the realm. And shall forfeit all his
 “ goods and chattels, and shall forfeit all his hereditaments,
 “ offices and estates of freehold, during his life.”

The second offence of this kind, *viz.* that of professing the
 Popish religion, is punished with the following disabilities,
First, Of taking an estate in lands. *Secondly*, Of presenting
 to a church.—Also it is punished with the following restraints,
 1. From keeping school. 2. From withholding a competent
 maintenance from a Protestant child.

Sett. 4. As to the first of the abovementioned disabilities,
viz. That of taking an estate in lands. It is enacted by 11
 & 12 W. 3. c. 4. “ That every person educated in or professing
 “ the Popish religion, who shall not, within six months after
 “ the

1 Atk. 526.
 537.
 2 Atk. 65. 155.
 210.
 3 Atk. 155.
 457.

8 Mod. 167.

2 P. Will. 5.

155. 364.

10 Mod. 89.

230.

Strange 1096.

1 P. Will. 353.

Cowp. 468.

1 Will. 176.

“ the age of eighteen years, take the oaths of allegiance and supremacy, and subscribe the declaration against popery mentioned in 30 Car. 2. stat. 2. chap. 1. in the Chancery, or King’s Bench, or Quarter Sessions of the county where such person shall reside, shall in respect of himself or herself only, and not in respect of any of his or her heirs or posterity, be disabled to inherit or take by descent, devise or limitation, in possession, reversion or remainder, any lands, tenements or hereditaments, in England or Wales, &c. And during the life of such person, and until he take the said oaths, &c. his next of kin being a Protestant, shall enjoy the same, without being accountable for the profits, but shall not do wilful waste under pain of forfeiting treble damages to the party so disabled: and all Papists, or persons making profession of the Popish religion, are disabled to purchase in their own names, or the names of others, to their use or in trust for them: and all estates, terms and other interest and profits whatsoever, out of lands made to their use, or on any trust, mediately or immediately, for their benefit, are void.”

9 Mod. 172.

181.—But a

Papist tenant in

tail who suffers

a recovery to

himself in fee in

order to make a

Sett. 5. In the construction hereof it was resolved by the House of Lords, in Roper’s case, That the devise of the residue of money arising from the sale of an estate appointed to be sold for payment of debts, &c. is within the statute.

marriage settlement; is not a purchaser within the act. Str. 267.

4 Burn. 23.

† But by 18 Geo. 3. c. 60. the above clause in the statute of William the Third is repealed, and all persons having or claiming any lands, tenements or hereditaments, under titles not hitherto litigated shall enjoy the same as if the said act of 11 and 12 Will. 3. c. 4. had not been made, provided always, that all such persons, within the space of six calendar months after the passing of this act, or of the accruing of his, her, or their title, being of the age of twenty-one years; or within six months after he, or she shall attain the age of 21 years, or being of unsound mind, or in prison, or beyond the seas, then within six months after such disability removed, shall take and subscribe the oath in the words as recited in the statute.”—Which oath the courts of Record and Chancery at Westminster, in Wales, Chester, Lancaster, Durham, or any General or Quarter Sessions of the Peace, of any county or place in England are required to administer and to register.

Precedent of a title made under these statutes.

Lut. 1101.

1117.

C. myns 182.

Gibson 771.

3 Lev. 332.

Sett. 6. As to the second of the above mentioned disabilities, viz. That of presenting to a church, which by 3 Jac. 1. 5. s. 18, 19, 20, 21. and 1 Will. & Mar. c. 26. did extend only to Popish recusants convicted, and persons refusing to make the declaration against Popery, mentioned in 30 Car. 2. st. 2. it is enacted by 12 Ann. st. 2. c. 14. “ That every Papist, or person making profession of the Popish religion, &c.

“ &c. and every mortgagee, trustee, or person any ways intrusted by or for such Papist, &c. with or without writing, shall be disabled to present to any benefice, school, or hospital, &c. or to grant any avoidance of any benefice, prebend or ecclesiastical living; and that in all cases the Universities shall present.”

Sec. 7. Also by force of the said statute, “ The ordinary may tender the declaration against transubstantiation to any reputed Papist making a presentation, and upon a refusal to take the same, the presentation shall be void: also the ordinary may examine every presentee upon oath, whether the person who presented him be the true patron, or only a trustee? And the court wherein a *quære impedit* shall be brought, may in like manner examine the parties, and a bill may be brought in any court of equity to discover such secret trusts, &c. and the answer of such persons upon any such examination or bill shall be good evidence against such patron, in respect of such a presentation, but not as to any other purpose.”

† And it is also enacted by 11 Geo. 2. c. 17. s. 5. “ That every grant of any advowson, or right of presentation, collation, nomination, or donation of and to any benefice, prebend, or ecclesiastical living, school, hospital or donative, and every grant or any avoidance thereof by any Papist, or person making profession of the Popish religion, or any mortgagee, trustee, or person any ways intrusted directly or indirectly, mediately or immediately, by or for any such Papist, whether declared by writing or not, shall be null and void, unless such grant shall be made *bona fide*, and for a full and valuable consideration to and for, and merely and only for the benefit of a Protestant purchaser, and every such grantee shall be deemed a trustee, &c. and compelled to discover, and according to 12 Anne.—And that every devise thereof, with intent to secure the benefit to the heirs or family of such Papist shall be null and void, and the devisee bound to discover as aforesaid.”

Vide 24 Geo. 3.
sess. 1. ch. 1.
1 Geo. 1. s. 2.
ch. 55.
3 Geo. 1. ch.
18.

Sec. 8. I do not know that any resolution hath been given on either of the above mentioned statutes of 1 Will. & Mar. or 12 Ann. However, the expositions which were made on 3 Jac. 1. seeming to be for the most part applicable to these latter statutes also, I shall take notice of the principal of them; as,

Sec. 9. First, That where a presentment is *pro hac vice* vested in the university by reason of the patron's being a Popish recusant at the time when the church became void, it shall not be divested again by his conforming himself to the church, or by his death.

11 Co. 47. s. 8.
Comyns 182.
10 Co. 57.

Sec. 10. Secondly, That such a patron is only disabled to present, and that he continues patron as to all other purposes, and therefore that he shall confirm the leases of the *incumbent, &c.*

Cawley 230.

Sec.

1 Jon. 19, 20.

Sec. 11. *Thirdly*, That such a person by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years, *bona fide*, and for good consideration.

1 Jon. 20, 21,

&c.

Hob. 126, 127.

Moor 872.

Sec. 12. *Fourthly*, That if an advowson or avoidance belonging to such a person come into the king's hands, by reason of an outlawry, or conviction of recusancy, &c. the king, and not the university, shall present.

Sec. 13. As to the first of the above mentioned restraints, *viz.* that which relates to the keeping school, it is enacted by the said statute of 11 & 12 Will. 3. c. 4. f. 3. "That if any Papist, or person making profession of the Popish religion, shall be convicted of keeping school, or taking upon themselves the education or government, or boarding of youth in any place within this realm, or the dominions thereunto belonging, they shall be adjudged to perpetual imprisonment."

Vide ch. 13.
f. 2.

† But this clause is repealed by 18 Geo. 3. c. 60. provided the party shall take and subscribe the oath therein recited, before he shall have been apprehended or any prosecution commenced against him.

Sec. 14. As to the second of the above mentioned restraints, *viz.* that which relates to the power of a Popish parent over his Protestant child, it is enacted by the said statute of 11 & 12 Will. 3. c. 4. "That if any Popish parent, in order to compel a Protestant child to a change of religion, shall refuse to allow such child a sufficient maintenance, suitable to the degree and ability of such parent, and to the age and education of such child, the Lord Chancellor upon complaint may make such order therein, as shall be agreeable to the intent of the said act."

4 Comm. 115.

Sec 3 & 4 Ed.

6. c. 10.

23 Eliz. c. 2.

Sec. 15. The third offence of this kind, *viz.* that of selling or buying Popish books, depends upon 3 Jac. 1. c. 5. f. 25. by which it is enacted, "That no person shall bring from beyond the seas, nor shall print, buy, or sell any Popish primer, ladies psalters, manuals, rosaries, Popish catechisms, missals, breviaries, portals, legends and lives of saints, containing superstitious matter, printed or written in any language whatsoever, nor any other superstitious books printed or written in the English tongue; on pain of forfeiting forty shillings for every book, &c. and the books to be burnt."

CHAPTER THE SIXTEENTH.

OF OFFENCES AGAINST THE ESTABLISHED
CHURCH BY PROTESTANT DIS-
SENTERS.

OBSTINATE nonconformists were compellable by 31 Eliz. c. 1. to abjure the realm, and were also subject to all the penalties mentioned in the tenth and eleventh chapters of this book; and dissenters were farther restrained by 17 Charles the Second, chapter 2. and 22 Charles 2. ch. 1.—But at this day by 1 William & Mary c. 18. s. 2. “All persons dissenting from “the church,” except papists, and those who shall in preaching or writing deny the doctrine of the Trinity “are exempted “from all penal laws relating to religion,” except the twenty-fifth of Charles the Second, chap. 2. by which all officers of trust are bound to receive the sacrament according to the usage of the church of England, and also to take the oaths of allegiance and supremacy, and the test, and also except 30 Charles 2. s. 2. c. 1. by which the members of both houses of parliament, and all the king’s sworn servants (a) are bound to make a declaration against transubstantiation and the invocation of saints, and the sacrifice of the mass, “provided such dissenters take the oath of allegiance and “supremacy, and make the said declaration against transubstantiation, &c. and come to some congregation for religious worship, in some place registered (1) either in the “bishop’s court or at Sessions, the doors whereof shall be “neither locked, barred, nor bolted.”

2 Burn. E. L.
143.
4 Comm. 53.
2 Jones 235,
233, 234.

Vide sup. ch. 8.

(a) This clause relating to the king’s sworn servants is repealed by 2 Geo. 2. c. 31. Salk. 527.

(1) In registering the certificate, the justices are merely ministerial, and if persons resorting to any such meeting house, do not bring themselves within this act, such registering will not protect them from the penalties of the law. 1 Black. 606.—Nor doth this act extend to all persons who shall think fit to stile themselves protestant dissenters. 3 Burn. E. L. 179. therefore if a man be a professed churchman, and only sometimes go to meetings, the toleration act will not excuse him. 6 Mod. 190. A minister also, exercising his functions, without being licenced by the bishop, Lindwood 288. in a chapel of ease, according to the rites of the church of England, is not within the act, for by Lord Hardwicke, it was made to protect tender consciences from penalties, and to extend it to those of the church who act contrary to its rules and discipline, would introduce an endless confusion. 2 Atk. 498.

Sec. 2. Also by section 8, 9, 10, 11, 12. “Dissenting “teachers are tolerated, if they take the said oaths, &c. at the “General or Quarter-Sessions to be held for the place where “such persons live, and subscribe the thirty-nine articles of the “church of England, except those few scrupled ones concerning church-government and infant-baptism.” And
by

Salk. 572.
Barr. 1043.

As to Quakers
Vide 8 Geo. 1.
c. 6. and 22
Geo. 2. c. 46.
L. 36.

3 Lev. 376.
Gibb. 519.
Sed vide the
marriage act.
26 Geo. 2.
c. 33. *Infra*.

by 10 Anne c. 2. s. 7, 8, 9. "They may qualify themselves, as well during a prosecution upon any penal statute, as before, and being qualified in one county may officiate in another, upon producing a certificate, and taking the said oaths, &c. if required."

Sect. 3. Also by the said statute of 1 William and Mary s. 13, 14, 15. Those who scruple the taking of any oath, are within the like indulgence, provided they subscribe the aforesaid declaration, and also a declaration of fidelity to the king, and against the deposing doctrine and papal supremacy; and also profess their faith in God the Father, and Jesus Christ his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the holy scriptures of the old and new testament to be given by divine inspiration.

Sect. 4. Since this statute a prohibition lies to the spiritual court proceeding against persons for incontinency, who have been married in a licensed conventicle.

† *Sect. 5.* And by 19 Geo. 3. c. 44. which declares the 1 Will. and Mar. c. 18. to be a public act, "every person dissenting from the church of England, in holy orders, or pretended holy orders, or pretending to holy orders, being a preacher or teacher of any congregation of dissenting protestants, who, if he scruple to declare and subscribe as aforesaid, shall take the oaths, and make and subscribe the declaration against popery required by the said act of 1 Will. & Mary, to be taken, made and subscribed by protestant dissenting ministers, and shall also make and subscribe a declaration in the words following 'I A. B. do solemnly declare, in the presence of Almighty God, that I am a christian, and a protestant, and as such that I believe that the scriptures of the old and new testament, as commonly received among protestant churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice' shall be, and every such person is hereby declared to be, intitled to all the exemptions, benefits, privileges and advantages of 1 Will. & Mary c. 18. and 10 Anne c. 2. and the justices of the peace at the General Sessions of the peace, where any protestant dissenting minister shall live, are required to administer the last mentioned declaration to such minister, upon his offering himself to make and subscribe the same."—And it is further enacted, "that no protestant dissenter so qualified as aforesaid, shall be prosecuted for teaching and instructing youth, as a tutor or schoolmaster, in any case whatsoever,"—provided always "that this qualification shall not intitle such dissenters to obtain or hold, the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless founded since 1 Will. & Mary for

“ for the immediate use and benefit of protestant dissenters.” (2).

(2) The law so far favours dissenters, as to permit the establishment of charities for the support of their ministers 2 Vesty 273. Buttr. 1267. and they are exempted by this act c. 11. from serving upon juries, and upon county, ward, or parish offices. And by 19 Geo. 3. c. 44. from serving in the militia under 2 Geo. 3. c. 20. The King's bench also will grant protection to a protestant dissenting minister by mandamus. Burr. 1265. By information also for the disturbance of his congregation. Gibb 304. 1 Mod. 168—And to destroy any religious meeting-house registered according to the toleration act is felony without clergy. And the hundred made liable to the damages: 1 Geo. 2. st. 2. c. 5. L. Ray. 125.—But no marriage can be celebrated, but in some church or chapel where banns have usually been published; unless the parties are Jews or Quakers: 26 Geo. 2. c. 33.—And by Lord Mansfield all the consequences of the act of toleration ought to be purified with the greatest liberality in case of the scrupulous consciences of dissenters; guarding at the same time against any prejudice that may arise to the rest of the king's subjects from this indulgence and protection. Cowp. 388, 393. 4 Comm. 52.—Respecting meeting-houses in Scotland: Vide 10 Anne c. 7. 19 Geo. 2. c. 38. 21 Geo. 2. c. 34.

CHAPTER THE SEVENTEENTH.

OF HIGH TREASON;

OF Offences more immediately against man; so the are more immediately against the king, others more immediately against the subject.—Offences more immediately against the king are either capital or not capital. The capital offences of this nature are either high treason or felonies.

Sec. 1. And First, Of high treason; concerning which, before 25 Edw. 3. c. 2. there was great diversity of opinions, and many offences were taken to be included in it, besides those expressed in the said statute; as the killing of the king's father, brother or, even of his messenger; producing the pope's bull of excommunication, and pleading it in disability; refusing to accuse a man in the king's courts, and summoning him to appear, and defend himself before a foreign prince; and other such like acts tending to diminish the royal dignity of the crown.

Sec. 2. But all treasons were settled by the said statute of 25 Edw. 3. c. 2. which, by 1 Mary, sess. 1. c. 1. was reinforced, and again made the only standard of treason; and all statutes between the said statutes of 25 Edw. 3. and 1 Mary, which made any offences high or petit treason, or misprision of treason, are abrogated. So that no offence is, at this day, to be esteemed high treason, unless it be either declared to be such by the said statute of 25 Edw. 3. or made such by some statute since the first of Mary.

And therefore I shall consider, First, Such offences as are high treason within the said statute of 25 Edw. 3. or other
Vol. I. E statutes

statutes grounded thereon, and explaining the same.—Secondly, Such as are made high treason by subsequent statutes.

1 Hale 87.
Sum. 17.

And First, By the said statute of 25 Edw. 3. there are four kinds of high treason. *First*, That which immediately concerns the king, his wife, or children. *Secondly*, That which concerns his office in the administration of justice. *Thirdly*, That which concerns his seal. *Fourthly*, That which concerns his coin—And these three last are called interpretative treasons.

1 H. 4. c. 10.
Kely 20.
1 Inst. 1. 6. 113.
8 Co. 28.
Dyer 98. 298.
228. 332.
B. Trea. 1, 2,
3. 7. 9. 11. 13.
16. 19. 24. 27.
32.
Co. Pla. 360.
3 Co. 2. 10.
4 Co. 57.
7 Co. 33.
13 Co. 54.
Sav. 4.

Secd. 3. That of the first kind is thus declared by the following words of the said statute of 25 Edw. 3. “Whereas divers opinions have been before this time, in what case treason shall be said, and in what not, the king, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth; that is to say,—When a man doth compass or imagine the death of our lord the king.—Or of my lady his queen,—Or of their eldest son and heir;—Or if a man do violate the king’s companion,—Or the king’s eldest daughter unmarried;—Or the wife of the king’s eldest son and heir;—Or if a man do levy war against our lord the king in his realm,—Or be adherent to the king’s enemies in his realm, giving them aid and comfort in the realm or elsewhere,—and thereof be provably attainted of open deed by the people of their condition.”

For the explication of which I shall consider, First, The branch relating to the king and his relations. Secondly, That concerning the levying of war, and adhering to the king’s enemies, &c. Thirdly, That concerning an overt act.

As to the branch relating to the king and his relations, I shall consider the following particulars: 1. Who may be guilty? 2. What is the import of the words, “*Compass or imagine the king’s death?*” 3. Who is a king within the act? 4. What is the extent of the clause concerning the king’s relations?

Kellw. 181. &c.
3 Inst. 4. 8.
Calvin’s case 6.
4 Comm. 29.
Sum. 47.
Bac. Max. 56.
5 Bac. Ab. 112.

Secd. 4. As to the first point, viz. Who may be guilty? I shall take it for granted at this day, That all subjects of the age of discretion, and of sane memory, whether they be ecclesiastical or temporal, men or women, are included within those general words “When a man doth compass, &c.”

(a) B. Trea. 32.
3 Inst. 5. 11.
Co. Lit. 129.
Sum. 10. 15.
1 Hale 96.—
100.
5 St. Tr. 23.
6 St. Tr. 87.

Secd. 5. Also it seems clear, that the subjects of a foreign prince coming into England, and living under the protection of our king, may, in respect of that local ligeance which they owe to him, be guilty of high treason (a), and indicted that they, *contra dominum regem*, (the words *naturalem dominum suum* being omitted) did compass, &c. *contra legantibus* sue

sua debitum (b). And it is said, that even an ambassador committing a treason *against the king's life*, may be condemned and executed here, and that for other treasons he shall be sent home.—And it hath been holden, that there is no need of the words *contra ligeantiam sua debitum* in an indictment for a treason, which is made such by statute, and is not a treason in its own nature. And that there is no necessity for the words *contra ligenum supremum dominum suum* in any indictment of treason.

(b) Dyer 145.
Hob 271.
Salk. 631. 633.
Carth. 319.
Skin. 360. 425.
Fof. 186. 187.
L. Ray, 1.
3 Lev. 396.
4 Mod. 162. 395.
7 Co. 6.
12 Mod. 51.
95. 1 Hale. 59.

Sec. 6. But it seemeth that aliens, who in an hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but shall be dealt with by martial law.

B. Treas. 1, 32.
3 Inst. 11.
Con. Dalif. 32.
7 Co. Rep. 6.
5 Bac. Ab. 122.
5 St. Tr. 23.

Sec. 7. It hath been resolved, That one born a natural subject is bound to such an inseparable allegiance to our king, that howsoever he may endeavour to renounce it, and transfer his subjection from his natural to a foreign prince, yet if he practise what in any other subject would amount to high treason, he shall suffer as a traitor.

Dy. 300. 298.
Co. Lit. 129.
Fof. 70. 184.
1 Hale 68. 96.

Sec. 8. As to the second point, viz. the import of the words "Compas or imagine the king's death." Since the said statute these words have been so strictly followed, that where a king has been actually murdered, yet not the killing him, but the compassing his death has in the indictment been laid as the treason, and the killing as an overt act thereof.

Kely. 8.
1 Hale 107.
119—167.
Prin. P. L. 123.
Fof. 193. 196.
3 Inst. 12.

Sec. 9. And such compassing the king's death may be manifested not only by overt acts of a direct conspiracy to take away his life, but also by such as shew such a design, as cannot be executed without the apparent peril thereof; as by (c) writing letters to a foreign prince, inciting him to invade the realm; or assembling men together in order to (d) imprison or (e) depose the king, or to (f) compel him by force to yield to certain demands, or to levy war against his (g) person.

(c) Dyer 298.
Burr. 646.
Sum. 11.
1 St. Tr. 199.
206.
2 Vern. 315.
3 Inst. 14.
4 St. Tr. 406.
1 Hale 120.
(d) 3 Inst. 6.
12. 38.
(e) Kely 20.

21. 22. Qu. B. Treas. 24. (f) 11 Mod. 322. Moor. 621. (g) Kely 14, 15. 17. 20. 21.
3 Inst. 6. 12. 38. Kely 20, 21, 22. Yet this was made a query in B. Treas. 24. 11 Mod. 322.
Moor 621. Kely 14, 15. 20, 21.

(1). Every thing wilfully and deliberately designed, or attempted to be done, whereby the life of majesty may be endangered, is an act of compassing his death. Fof. 195. but the guilt commences only when *some measure* shall appear to have been taken, to effectuate the guilty purpose. Prin. P. L. 121. 1 Hale 119. Kely. 17.

Sec. 10. But it is possible that it may not be proved by an act, which directly causes the king's death; as the glancing of an arrow did that of William Rufus, proving fatal merely through an *unfortunate accident*, and being accompanied with no unlawful circumstance.

3 Inst. 6.
1 Hale 107.

Sum. 12.

3 Inst. 7.

9 Ed. 4. 1.

1 Hale 101. &c.

Post. 133. 400.

4 Comm. 77.

Sect. 11. As to the third point, *viz.* Who is a king within this act? It seems agreed, that every king for the time being, in actual possession of the crown is a king, within the meaning of this statute. For there is a necessity that the realm should have a king, by whom and in whose name the laws shall be administered; and the king in possession being the only person, who either doth or can administer those laws, must be the only person who has a right to that obedience, which is due to him who administers those laws; and since by virtue thereof he secures to us the safety of our lives, liberties, and properties, and all other advantages of government, he may justly claim returns of duty, allegiance, and subjection.

1 Hale 61, 103.

103.

Sum. 12.

Stow, Ann.

413.

Fos. 398. 136.

9 Ed. 4. 1.

B. Treas. 10, 32.

1 Inst. 7.

Dalt. 223.

Sect. 12. And this plainly appears even by the prevailing opinions in the time of king Edward the Fourth, in whose reign the distinction between a king *de jure* and *de facto* seems first to have begun; and yet it was then laid down as a principle, and taken for granted in the arguments of Bagot's case, that a treason against Henry the Sixth, while he was king in compassing his death, was punishable afterward Edward the Fourth came to the crown, from which it follows that allegiance was allowed to have been due to Henry the Sixth while he was king, because every indictment of treason must lay the offence, *contra ligeantiam debitum*.

9 Ed. 4. 1, 2.

B. Judg. 42.

C. of Par. 22.

Patents 21.

Denizen 3.

Exempt 4.

Judg. 42. F.

Att. 29. Deniz. 1.

Sect. 13. It was also settled, That all judicial acts, done by Henry the Sixth while he was king, and also all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by Edward the Fourth, before he was actually king, was void, even after he came to the crown.

9 Ed. 4. 1, 2. 11. 9 Ed. 4. 2.

Sect. 14. And by the 11 Hen. 7. c. 1. it is declared "That all subjects are bound by their allegiance to serve their prince and sovereign lord for the time being, in his wars, for the defence of him and his land against every rebellion, power, and might reared against him, &c. and that it is against all laws, reason, and good conscience, that they should lose or forfeit any thing for so doing;" and it is enacted, "That from thenceforth no person that attend on the king for the time being, and do him true and faithful allegiance in his wars, within the realm or without, shall for the said deed and true duty of allegiance be convicted of any offence."

Foster 399.

Cust. de Norm.

mand. 13.

Fleta. b. 3. c.

16. f. 22.

Sect. 15. From hence it clearly follows: First, That every king for the time being has a right to the people's allegiance, because they are bound thereby to defend him in his wars against every power whatsoever.

4 Comm. 77.

Foster 133.

Sect. 16. Secondly, That one out of possession is so far from having any right to our allegiance by virtue of any other title, which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him.

Sect.

Self. 17. It is true indeed, that after the restoration of king Charles the Second, it was resolved; that all those who acted against, and kept him out of possession, in obedience to the powers then in being, were traitors.

Foster 402.
Kely. 14.

Self. 18. But it ought to be considered, that it was first resolved by the same judges, that king Charles the Second was king *de facto* as well as *de jure*, from his father's death; and it is apparent, that no other person was in possession of any sovereign power known to our laws.

Kely 14, 15.
1 Keb. 315.
Foster 403.
1 Keb. 454.
4 Comm. 77.

Self. 19. However, it is a general uncontested rule, that upon the death of a king in actual possession of the crown, his heir is a king within the act before his coronation. For without a king to execute the laws, justice must fail; and therefore it is a maxim, that the king never dies.

3 Inst. 7.
Sum. 12.
1 Hale 61. 102.
Fol. 188. 189.

Self. 20. A titular king, as the husband of a queen regnant, seems to be within the words, yet it is clearly not within the meaning of this law; and *converso*, a queen regnant is not within the strict words, and yet she is undoubtedly within the meaning; for by the words, "Our lord the king," is meant any person invested with the regal power.

1 Hale 108.
106.
1 Mar. R. 3.
c. 2.
Sum. 12.
1 Inst. 8.
4 Comm. 76.
77.

Self. 21. By 1 Will. and Mar. sess. 2. c. 2. s. 9. "Every person that shall be reconciled to, or hold communion with, the church of Rome, or profess the Popish religion, or marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the crown of this realm, &c. And in every such case the people of this realm are absolved from their allegiance, &c."

Self. 22. As to the fourth point, viz, The extent of the clause concerning the king's relations. It to be observed,—First, That no queen or prince's dowager is any way within the purview of it. Secondly, That if the companion (by which word is meant the wife) of the king or prince, consent to an adulterer, she is no less guilty of high treason than he. Thirdly. That under the words "Their eldest son and heir," the son of a queen regnant is included, and also the second son after the death of the first, and *perhaps* also a collateral heir apparent, especially if he be declared such by parliament.

Hale 124, &c.
Britt c. 22.
3 Inst. 2. 8.
Sum. 12.
4 Comm. 81.

(2).

(2) A queen, divorced *a vinculo matrimonii*, is not within this statute, 1 Hale 124; nor is the wife of a king's second son, although her issue would succeed to the throne. In preference to the issue of the eldest daughter; neither doth it seem treason to violate the eldest daughter, that hath been married, such violation not being within the letter, though within the reason of the statute Prin. P. L. 124, 125.—The king's eldest daughter, if he has no son, is neither within the words nor the meaning of "the king's eldest son," for a son may possibly be born. It is therefore must for the legislature to provide for this case, 1 Hale 127. And both Coke and Hale are of opinion that a collateral heir apparent is not within the statute until he is so declared by parliament 3. Inst. 8. But a second daughter, the eldest being dead, is within the words, "the king's eldest daughter unmarried." 1 Hale 128. Foster's first Discourse.

1 Hale 137.
141. 150. 153.
Foster 208.

And now we are come to the Second general branch of this kind of high treason, *viz.* That concerning the levying of war, &c. and adhering to the king's enemies, &c. In treating whereof I shall consider, First, What acts shall be said to amount to a levying of war against the king. Secondly, What shall be said to be an adherence to the king's enemies.

Foster 195.

Sec. 23. As to the first point, it is to be observed, that not only those who directly rebel against the king, and take up arms in order to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority, or endeavour to reform his government, are said to levy war against him; and therefore,

Fof. 13, 14.
216. 217. 219.
3 Inst. 16.
H. Treas. 24.
Dalt. c. 89.
1 Hale 49. 139.
146. 296. 168.
169.
Moor 621.
Sum. 14. 2

Sec. 24. Those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him.—But those who join themselves to rebels, &c. for fear of death, and retire as soon as they dare, seem to be no way guilty of this offence (3).

And. 5. Kely. 75. 9 St. Tr. 57. 566. Salk. 635.

(3) The apprehension of injury to property either real or personal, of whatever extent, or however enormous or impending it may be, will not extenuate the guilt of this offence; for every artful leader of a rebellion might easily contrive to furnish his followers with this excuse. 8 St. Tr. 56. & Comm. 30. 83. The just apprehension of immediate death, derived from a serious force upon the person of the offender, and continued in such a manner throughout the period of subjection, that the traitor could not attempt an escape with probability of success, is the true and only circumstance that will extinguish the guilt, and avoid the punishment of *constrained* treason. 9 St. Tr. 566.—And this plea has been very strictly construed; for the officer who commanded at the execution of Charles the First, alledged in vain upon his defence, that he had acted by the command of superiors whose power compelled him to obey. 1 Hale 50. Kely 13. And certainly it is not for private individuals, misguided by ignorance or heated by faction, to determine the proper moment of resistance, Prin. P.L. 131.—But whether force or no force; how long that force continued, with every circumstance tending to shew the practicability of an escape are facts for the consideration of a jury. Fof. 14. 216.

1 Hale 137.
135. 152. 153.
Moor 621.
C. Car. 533.
589.
Pop. 122.
2 And. 4. 5.
3 Inst. 9.
1 Ven. 250.
Sum. 14.
Kely. 76.
2 Will. 305.
8 St. Tr. 289.
Foster 209,
210. 211.
Doug. 510.

Sec. 25. Those also who make an insurrection in order to redress a publick grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority, which he by publick justice ought to do, which manifestly tends to a downright rebellion; as where great numbers by force attempt to remove certain persons from the king; or to lay violent hands on a privy counsellor; or to revenge themselves against a magistrate for executing his office; or to bring down the price of victuals; or to reform the law or religion; or to pull down all bawdy-houses; or to remove all inclosures in general, &c. (4)—But where a number of men

(4) An attempt by intimidation and violence to force the repeal of a law, is a levying of war against the king and high treason. Lord Mansfield, Doug. 570.

rise to remove a grievance to their private interest, as to pull down a particular inclosure intrrenching upon their common, &c. they are only rioters.

Sec. 26. In a special verdict, not only those who are expressly found to have been aiding and assisting a rebellious insurrection, but perhaps also those who are only found to have acted in the execution of the intended violence, or to have attended the principal offender from the beginning, though they be not found to have known the design of the rising, shall be adjudged guilty of high treason. But those who are found only to have suddenly joined with them in the streets, and to have flung up their hats and hallowed with them, are guilty of no greater offence than a riot at most.

Sec. 27. However it is certain, that a bare conspiracy to levy such a war cannot amount to treason, unless it be actually levied. Yet it hath been resolved, that a conspiracy (5) to levy war against the king's person may be alledged as an overt act of compassing his death, and that in all cases, if the treason be actually compleated, the conspirators, &c. are traitors as much as the actors; and (a) that there may be a levying of war, where there is no actual fighting.

3 Inst. 11. 1 Hale 165. to 169. Sum. 14. 115. Dalif. 89. 224. 2 Ven. 31. 315, 316. 5 Bac. Ab. 117. Foster 342. Prin. P. L. 122. 10 Mod. 322.

(5) By 13 Eliz. and 13 Car. 2. conspiracies to levy war were declared high treason; and several judgments were given upon those statutes; but they both expired with the reigns they were designed to protect. For. 213.

Sec. 28. As to the second point, viz. what shall be said to be an adherence to the king's enemies, &c. this is explained by the words subsequent, "Giving aid and comfort to them;" from which it appears, that any assistance given to aliens in open hostility against the king, as by surrendering a castle of the king's to them for reward, or selling them arms, &c. or assisting (b) the king's enemies against his allies, or cruising in a ship with enemies to the intent to destroy the king's subjects is clearly within this branch. But there is no necessity, expressly to alledge, that such adherence (c) was against the king, for it is apparent; (6) yet the special manner of adherence must be set forth. And it is said, that the succouring a rebel fled into another realm is not within the statute, because a "rebel is not properly an enemy," and the statute is taken strictly.

(6) Although the solemnity of a previous denunciation of war is not always necessary or expedient. Bynkershoek, p. 1. Yet it is necessary to aver, in proceedings on this clause of the act, that the persons adhered to, were the king's enemies, 2 Ventris 316. which fact may be evidenced by its public notoriety. Prin. P. L. 136.—Vide 2 & 3 Ann. 2. 20. s. 34.

Fof. 194. 20.
1 Hale 122.
4. 6 St. Tr.
5 St. Tr. 21.
22.

Self. 29. As to the branch relating to an overt act, I shall take it for granted, that some overt act must be alledged in every indictment of high treason, in compassing the death of the king, &c. or levying war, or adhering to the king's enemies; but there hath been some question concerning what shall be said to be such an overt act, as to which I shall consider, —First, What facts amount to such an overt act. —Secondly, Whether any words be sufficient.

10 Mod. 323.
3 Inst. 14.
Kely. 20.

Self. 30. As to the first point it seems clearly agreed by all, that conspiring the king's death, and providing weapons to effect it, or sending letters to incite others to procure it, or actually assembling people in order to take the king into their power, and all other such like notorious facts, done in pursuance of a treasonable purpose against the king's person, may be alledged as overt acts to prove the compassing his death.

(a) Kely. 14.
17.
(b) Kely. 20.
3 St. Tr. 149.
18. 228.
4 St. Tr. 63.
277.
18. 228.
5 St. Tr. 114.
18.
(c) Kely. 15.
3 St. Tr. 126.
(d) 1 Mod. 106.
(e) 2 Ventr. 116.
(f) 1 Kely. 22.
3 St. Tr. 977.
3 St. Tr. 228.
Prin. P. L. 123.

Self. 31. It has also been adjudged, that the (a) levying war against the king's person; or the bare (b) consulting to levy such war; or meeting together and (c) consulting the means to destroy the king and his government; or (d) assembling with others, and procuring them to attempt the king's death; or lifting (e) men in order to depose the king; or (f) printing treasonable positions, as that the king is accountable to the people, and that they ought to take the government into their own hands, &c. or publishing a book to prove that (g) the king's government is antichristian and heretical, &c. may be alledged as overt acts to prove the compassing the king's death (7).

Sup. f. 24. (g) 2 Roll. 89, 90. Fof. 346. 11 Mod. 322. 5 Bac. Ab. 117.

(7) Soliciting a prince, in amity with the crown, to invade the realm is an overt act of the *intention* to levy war and may be laid as an overt act of compassing the king's death. — And a correspondence designed to enable the enemy to annoy us or to defend themselves, although intercepted in its first progress, at the post office, is an overt act of both these species of treason. Burrow 646. 10 State Trials Appen. 77. for the treason was complete on the part of the agent though it had not the effect he intended. Fof. 217, 218. Prin. P. L. 137.

2 Roll. 89.
Co. Car. 125.
See the reversal
of the attainder
of A. Sidney.
1 W. & M. St.
c. 7. private
acts.
1 Hale 118.
3 St. Tr. 733.

Self. 32. As to the second point, viz. Whether any words are sufficient overt acts? It has been holden, That written words in a sermon or other writing may amount to overt acts of compassing the king's death, though the same neither actually were, nor ever were intended to be, preached or published. But this opinion seems to be over severe; for though it be true, that *scribere est agere*, yet surely it cannot with any propriety be said, that to write in such a private manner *est aperte agere*, and it seems rigorous to make that amount to a malicious design against the king, which perhaps

perhaps was only done by way of amusement or diversion (8).

(8) This is *Peckham's case*. The reporter says that "many of the judges were of opinion that it was not treason; it therefore weigheth very little; and no great regard hath been paid to it since." *Salk. 139.* And, if the *statute* be considered, in which the conviction of this innocent clergyman was procured, still due regard will be paid to it. Vide *Bacon's Letters* 111, 117. and *Hume's Hist.*

Seft. 33. But the great question is, Whether words only spoken can amount to an overt act of compassing the king's death? Which having been questioned by some great men, and denied by others, I dare not be presumptory concerning it (9).

S. P. C. 2.
Kely. 13.
3 Inst. 5. 14.
140.
Sum. 13.

(9) The intentions of the mind cannot be discovered but through the medium of some plain and unequivocal act; *Stamford* therefore inclines to think that a compassing "*utere per parem*," is not such a sufficient overt act, from which an inference of the guilty purpose should be drawn. S. P. C. 2. *Foster*, 202. Lord Coke says, that without an overt act words may make a man a heretic, but cannot make him a traitor, because they are capable of such an endless variety of construction, that few agree in the same opinion concerning them. 3 Inst. 14. 140. *Foster* 200. And Lord Hale expressly says, that bare words are not an overt act of treason. 1 Hale 111. 123.

Seft. 34. However it seems agreed, that words spoken only in contempt and disgrace of the king, and not directly shewing any purpose to rebel, or any way to hurt his person, or disturb his government, as those which charge him with a personal vice, as drunkenness, &c. or a personal defect, as want of wisdom or steadiness, &c. shall not be so far strained as to be made overt acts of compassing his death, &c.

C. Car. 117.
125.
Foster 200.

Seft. 35. Indeed it has been holden, that to affirm that another has a better title than the king is high treason, because it tends to draw people from their allegiance, and to create a mutiny, &c. but perhaps this may be questioned, because it cannot certainly appear from such words, whether the speaker had a design against the king's person or no? However there can be no doubt, but that such discourses are highly punishable, as great misdemeanors, and tending to raise doubts, and disturb the government.

Yelv. 107.
2 Roll. 90.
Palm. 426.
1 Black. 37.

Seft. 36. All the following words have been adjudged high treason, "If king Henry the Eighth will not take back his wife, he shall not be king, but shall die."—"If the king will arrest me for high treason I will stab him."—"If I knew that *Perkin Warbeck* was the son of Edward the Fourth, I would take his part against Henry the Seventh."

1 Roll. 175.
14 H. 8. 12.
Prin. P. L.
125, 126.

Seft. 37. But however the laws may stand in relation to such conditional words, or to loose words spoken without relation to any act, yet it seems clear that words joined to an act may explain it, and that words of persuasion to kill the king, or manifesting an agreement, or consultation, or directions to

Salk. 631.
2 Ven. 315.
4 St. Tr. 30.
31. 95, 172.
1 Hale 115,
116.
1 Roll. 185.

12 Mod. 72. C. Car. 117. 118. 125. 332, 333. 1 Lev. 57. 2 St. Tr. 133. 135. 3 St. Tr. 295. 1001. 1 Keo 14. 34. 179. 231. Dalt. 223, 224. 3 Mod. 53. See the precedent cited C. Car. 118. *Foster* 202.

that

that purpose, are sufficient overt acts of compassing his death. And it hath been strongly holden, that any deliberate words, which shew a direct purpose against the king's life, as these, "If I meet the king I will kill him," being spoken maturely and advisedly, are sufficient overt acts of compassing or imagining his death. (10)

(10) It is said, Kelynge 13, that in an indictment for "compassing the king's death" words may be laid as an overt act of that species of treason, yet Croghan's Case, Cro. Car. 339. which he cites as a precedent for this doctrine, is said, by Mr. Justice Foster, 203. by no means to warrant the conclusion, because though the words above mentioned were laid in that indictment, yet it further charged, that the speaker actually came into England for the purpose of killing the king. 1 Hale 116.---And it has been laid down on more occasions than one, since the Revolution, that loose words, not relative to any act or design are not overt acts of treason. 4 St. Tr. 581. 645. 1 Black. Rep. 37.

Yelv. 107. 197.
C. Jac. 276.
406. 413.
Hurt. 75.
Winch. 124.
1 Bulst. 148.
3 Bulst. 225.
1 Roll. 444.
Foster 202, 203,
204.

Sect. 38. And since the compassing or imagining of the king's death is the treason, and words be the most natural means of expressing the imagination of the heart, why should they not be good evidence of it? Besides, it has been often adjudged, That falsely to charge a man with speaking treason is actionable, which could not be, if no words could amount to treason, as in the arguments of those cases it is clearly holden that they may, and not so much as made a question.

S. P. C. 2.
Sum. 215.
Fol. 205, 207.

Sect. 39. Besides it is certain, that before the 25 Edw. 3. words might amount to treason; and it is a general rule, that in doubtful cases the reason of the common law ought to govern the construction of a statute. Also there can be no doubt but that he, who by command or persuasion induces another to commit treason, is himself a traitor; (for without question by such means he would be accessory to a felony; and it is an uncontroverted rule, that whatever will make a man an accessory in felony, will make him a principal in treason) and yet he does no act but by words.

5 Inst. 38.
1 Hale 111.
Foster 201.
in notis.

Sect. 40. As to Sir Edward Coke's argument from 3 Hen. 7. c. 14. which makes the compassing the king's death, or that of any of his council, &c. by the king's servants, felony; from whence he infers, that in the judgment of this parliament, the compassing the king's death by bare words could not be treason before; it may be answered, that this argument extends as well to the king's servants compassing his death by any other act whatever, as to their doing it by bare words; for all are equally within the 3 Hen. 7. and yet none will contend, but that the former hath always been treason.

Sum. 13.
1 Hale 1115,
115. 323.
3 Inst. 14.
Foster 201.

Sect. 41. As to the argument, that compassing the king's death by bare words cannot amount to treason, within 25 Edw. 3. because many late temporary acts of parliament have made it treason, which would be needless if it were so before; it may be answered, that the principal end of those statutes was to make it treason to charge the king with hereby

or schism, or usurpation, or to affirm that it was lawful to take up arms against him, which the Romanists were apt to be guilty of at the beginning of the reformation, and it may be questioned whether these be overt acts of high treason within 25 Edw. 3. Vide 2 Roll. 39. 90.

Sect. 42. Indeed it is recited in the preamble of 1 Mary, sess. 1. c. 1. "That the state of every king consists more assuredly in the love of the subjects towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments. And in special such laws so made, whereby not the ignorant but also the learned, minding honesty, are often trapped, yea many times for words only, without other fact or deed done or perpetrated; and thereupon the queen calls to remembrance, that many, as well honourable persons, as others of good reputation, had then of late, (for words only, without other opinion, fact, or deed) suffered shameful death, and expresses her pleasure, that the severity of such like extreme dangerous and painful laws shall be abolished." And then follows the enacting clause, "That from thenceforth none act or offence, being by act of parliament or statute made treason, petit treason, or misprison of treason, by words, writing, cyphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, petit treason, or misprison of treason but only such as be declared and expressed to be treason, petit treason, or misprison of treason, by 25 Edw. 3. Nor that any pains of death, penalty, or forfeiture, in any ways ensue to any offender for the doing any treason, &c. other than such as by the said statute of 25 Edw. 3. be ordained; any statute since the said twenty-fifth year of Edw. 3. or other declaration to the contrary in any wise notwithstanding."

Sect. 43. And it must be confessed, that this statute, *prima facie*, seems very much to favour the opinion, that no words whatsoever can of themselves amount to overt acts of high treason, inasmuch as one of the principal mischiefs intended to be redressed by it seems to be, that men had often suffered as traitors for words only; yet the force of this objection will be very much lessened, if we consider, that the principal purport of the said statute of 1 Mary seems to be, to make the 25 Edw. 3. according to the intention of the makers of it, the only standard of treason, and to abolish all subsequent statutes, which had made many offences treason, which were not contained in the said statute of 25 Edw. 3. but no way to extenuate the crimes mentioned in 25 Edw. 3. or to take away the force of any natural exposition thereof; for the first part of the preamble complains of such laws as not only inflicted punishments over severe for the crimes intended to be restrained by them, but were also penned in such a manner,

Foster 205.
1 Hale 117.
115. 323.

2 Shower 411.

as to be often apt to entrap the wisest by bare words. But surely this can no way be applicable to 25 Edw. 3. inasmuch as no punishments can be thought extreme for the crimes therein restrained, and there can be no danger from that statute of any man's being punished for unwary or innocent words, inasmuch as there is no colour to say, that any words as such, are punished within that statute, but only the most wicked imagination of the heart, which may be sometimes proved by the evidence of words. And it farther appears from the next part of the preamble of the said statute of 1 Mary that it has an eye only to such statutes as are above mentioned, inasmuch as it complains of persons having suffered shameful deaths for words only, without other opinion, fact or deed, which is very applicable to those many statutes in the time of Hen. 8. as 26 Hen. 8. c. 13. and 35 Hen. 8. c. 3. and some others, which made bare words high treason, many of which were so far from purporting a design against the king's life, that they were scarce otherwise criminal than as they were prohibited by those statutes. But surely this can have no relation to 25 Edw. 3. either in punishing a man for such imaginations of the heart as are most perversely wicked, or in suffering those imaginations to be proved upon him from his own mouth. Also it is farther remarkable, that the enacting clause restrains only such offences, as are made high treason by statutes subsequent to 25 Edw. 3. from being adjudged high treason by words, writing, cyphering, &c. and seems to leave the offences contained in the said statute to the same construction which they had before.

3 Inst. p. 14.
140.
1 Roll. 106

Sec. 44. As to the authority of Sir Edward Coke in his third Institute, it is of the less weight, because he is said to have been some time of the contrary opinion.

Old Bd. 13. 16.

Sec. 45. Neither does it appear to me, That my lord chief justice Hale was at all of this opinion; for though in the latter edition of his treatise of the Pleas of the Crown, it be said, that compassing by bare words is not an overt-act, &c. yet in the first edition published in the year 1678, it is twice said; that it hath been adjudged that words are an overt-act. (11)

(11) This great question, whether words only spoken, can amount to an overt act of compassing the king's death, is examined very much at length, and with great perspicuity by Lord Hale in his history of the Pleas of the Crown from p. 111. to 120. and 312. to 322. and by Mr. justice Foster from p. 196. to 207. in his discourse on high treason, both of them concluding, against the assertions of Kelynge and the doubts of Hawkins, that bare words are not overt acts of treason, unless "uttered in contemplation of some traitorous purpose actually on foot, or intended, and in prosecution of it."

1 Hale 230.

Sec. 46. The second kind of high treason, concerning the king's office in the administration of justice, is expressed in the words following. "If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned

"assigned to hear and determine, being in their places during their offices."

Stat. 47. It hath been holden, that this part of the statute shall not be extended by equity, to any other high officers of state beside these expressly named, nor even to these when they are not in actual execution of their offices, nor to any attempt to kill them, nor even to the actual wounding of them, unless death ensue. (12)

[12] Therefore the barons of the exchequer, as such, are not within the protection of this act, 1 Hale 231.—neither do the lord keeper or commissioners of the great seal seem to be within it by virtue of the Statutes 5 Elis. c. 18. and 1 W. & M. c. 21. 4 Comm. 84. See *vide* 1 Hale 231.

† But by 7 Anne c. 21. s. 8. to slay any of the lords of session or judiciary of Scotland, in the exercise of their office is high treason.

Stat. 48. The third kind of high treason, relating to the king's seal, is said to have been high treason at the common law, and is expressed in the following words, "And if a man counterfeit the king's great or privy seal."

Stat. 49. It hath been holden, that these words extend to the aiders and confenters to such counterfeiting, as well as to the actors.

Stat. 50. But not to an intent or compassing to do it, if it be not actually done.

Stat. 51. Nor to the fixing of the great seal to a patent, without a warrant for so doing.

Stat. 52. Nor to the razing of the name of one man out of a patent, and putting in that of another, nor to any artificial removing of the true writing, and adding matter altogether new: nor, by the better opinion, to the taking off the wax impressed with the great seal from a true patent, and fixing it to a writing purporting a grant from the king.

Stat. 53. Nor to the counterfeiting of the sign manual, or privy signet. But this is made high treason by the first of Mary, st. 2. chapter the sixth.

† And by 7 Ann. c. 21. s. 9. To counterfeit the seals used and continued in Scotland according to the twenty-fourth article of the union, is high treason.

Stat. 54. The fourth kind of high treason concerning the coin is expressed in these words, "If a man counterfeits the king's money, and if a man bring false money into this realm, counterfeit to the money of England, as the money called luthburgh, or other like to the said money of England, knowing the money to be false, to merchandize or make payment, in deceit of our said lord the king and his people."

In treating hereof, I shall consider, First, The branch relating to the counterfeiting of the king's money. Secondly, That concerning the bringing of false money into the realm, &c.

In treating of the first branch I shall shew, *First*, What degree of counterfeit money will amount to high treason. *Secondly*, What shall be said to be the king's money within this act.

Sec. 55. As to the point of counterfeiting. It is said, that those who coin money without the king's authority, are guilty of high treason within this act, whether they utter it or not; and that those who have the king's authority to coin money, are guilty of high treason, if they make it of baser alloy than they ought; and that those also are guilty of the same crime, who receive and comfort one who is known by them to be guilty thereof; but that clippers, &c. are not within this statute. (13)

1 Hale 213, 214. 229.
B. Treas. 27.
Sum. 19, 20. 127.
3 Inst. 16.
Con. 6 H. 7 13.
3 H. 7. 10.
2 Inst. 375.
3 Inst. 17.
Brit. f. 10.
Fleta. 1. c. 22.
Kely 33. Con. Dyer 296. & 313. 1 Hale 233.

(13) To counterfeit the impression of half a guinea on a piece of gold previously hammered, not round, and not passable in the condition it then was, is not high treason, for the crime is incomplete. 2 Black. 632.

Sec. 56. But it seems, that those, who barely utter false money made within the realm, knowing it to be false, are neither guilty of high treason, nor of a misprison thereof, but only of a high misprison: yet by 8 & 9 Will. 3. c. 26. they are in some cases made guilty of felony, for which see the next chapter.

3 H. 7. 10.
Sum. 128.
B. Treas. 19.
1 Hale 214.
373. 375.

Sec. 57. As to the second point, *viz.* What shall be said to be the king's money? It seems, That such only as is coined by the king's authority either in gold or silver within the realm, and consequently not brass farthings, &c. shall come under this denomination.

2 Inst. 577.
3 Inst. 17.
2 Keb. 36.
Dalt. c. 89.
1 Hale 195.
192. 210. to 213.
1 Burn 359. 1 Comm. 278. Fof. 227. 12 Mod. 10. Co. Lit. 107. ch. 18. f. 5.

Sec. 58. But the mischiefs intended to be remedied by this statute, having been found by experience not to have been sufficiently redressed by it, as thus restrained, the same have been farther provided for by subsequent statutes.

Sec. 59. For by 1 Mary, sess. 2. c. 6. "If any person or persons falsely forge and counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, and is or shall be current within this realm, by the consent of the crown, they and their counsellors, procurers, aiders and abettors shall be guilty of high treason."

1 Hale 197.
T. Jones 233.

Sec. 60. And by 14 Eliz. c. 3. "If any person or persons falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, nor permitted to be current within this realm, they and their procurers,

3 Inst. 17.
1 Hale 376.

"aiders and abettors, shall be guilty of misprison of treason."

Stat. 61. And it is enacted by 5 Eliz. c. 11. s. 2. "That clipping, washing, rounding or filing, for wicked lucre or gain fake, of any the proper monies or coins of this realm, or the dominions thereof,—or of the monies or coins of any other realm allowed and suffered to be current within this realm or the dominions thereof at this present, or that hereafter at any time shall be the lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, and by proclamation allowed and suffered to be current here by the crown, or counselling consenting and aiding therein, shall be deemed to be treason."

And by the 18 Eliz. c. 1. "If any person or persons shall for wicked or lucre gain fake, by any art, ways, or means whatsoever; impair, diminish, falsify, scale or lighten the proper monies or coins of this realm, or any the dominions thereof,—or the monies or coins of any other realms allowed and suffered to be current at the time of the offence committed within England or any the dominions of the same by the proclamation of the crown, their counsellors, consenters and aiders shall be adjudged offenders in high treason, and lose and forfeit all their goods and chattels absolutely, and all their lands, tenements and hereditaments during his or their natural lives only: but no corruption of blood or loss of dower."

1 Hale 221. 328.

This offence was first created treason by 3 Hen. 5. c. 6. Prin. P. L. 139.

Stat. 62. And by 8 & 9 Will. 3. c. 26. made perpetual by 7 Anne c. 25. "Whoever (other than the persons employed in the mint) shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending, of any puncheon, counterpunchcon, matrix, stamp, dye, pattern, or mould (14) of steel, iron, silver or other metal or metals, or of spaud, or fine founders earth, or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress (15) the figure, stamp, resemblance,

Every thing necessary to shew the defendant had no authority, must be negatively averred in an indictment on this statute. Add. P. L. 149. For the form of indictments on this statute, vide C. Cir. Com. 167--171.

(14) Hugh Lennard was indicted for having in his possession "one mould of lead."—And, as the words "pattern or mould," are omitted in the last clause of this section of the act, it was submitted to the opinion of the judges.—First, whether "a mould" is comprized under the general words "other tool or instrument above mentioned." And secondly, If it be so comprized, whether it should not be described in the indictment as a "tool or instrument," mentioned in the statute.—They were unanimous, First, that this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprized under the general words.—And Secondly, that as it is expressly mentioned by name in the first clause, with respect to the making or mending, it need not be averred to be a tool or instrument so mentioned. Black. 809.

(15) So also in the same case, a doubt arose whether a mould, having only the resemblance of the coin inverted, was not an instrument which would *make and impress* the resemblance rather than one on which the *resemblance* was made and imprelled, (which was the way it was laid in this indictment,) the statute seeming to distinguish between such as will *make or impress* the similitude, &c. as a matrix, dye or mould,—and such on which the same is *made or imprelled*, as a puncheon, &c.—A great majority of the judges thought the indictment good, because the *stamp* of the coin was *certainly* imprelled on the mould, but they thought it would have been more accurate had it charged "a mould that would *make and impress* the similitude, &c." And in this opinion, some who otherwise doubted acquiesced.—Black 822.—But an instrument which would make or imprel the figure of only part of one side of the coin, is not within the statute. B. R. H. 571.

This is an offence at common law, and punishable as a misdemeanor. B. R. H. 371. Str. 1074.

But an offender attainted upon this statute, shall forfeit his lands. Salk. 85.

Prosecution to be in three months. f. 9.

“ or similitude, of both, or either of the sides or flats of any gold or silver coin current within this kingdom.—Or shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending, of any edger or edging tool, instrument or engine, not of common use in any trade, but contrived for making of money round the edges with letters, grainings, or other marks or figures, resembling those on the edges of money coined in his majesty’s mint—Or any press for coinage.—Or any cutting engine for cutting round blanks, by force of a screw, out of flatted bars of gold, silver, or other metal.—or shall knowingly buy or sell hide or conceal, &c. without lawful authority or sufficient excuse for that purpose, knowingly have in their houses, custody or possession any such puncheon, counterpuncheon, matrix, stamp, dye, edger, cutting instrument or other tool or instrument before mentioned—their counsellors, procurers, aiders and abettors, shall be adjudged guilty of high treason—But without corruption of blood, or loss of dower.”—And by 7 Anne c. 25. s. 2. the prosecution of such as offend against this act by making or mending, or beginning or proceeding to make or mend any coining tool or instrument therein prohibited or by making of money round the edges with letters or grainings may be commenced at any time within six months.”

And by par. 2. “ Whoever shall knowingly convey or assist in conveying out of the mint, any tool or instrument used for or about the coining of monies there, or any useful part of such tools or instruments.—Or whoever (other than the persons employed in the mint,) shall mark on the edges any the current coin of this kingdom, or of the diminished coin of this kingdom,—or any counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures like unto those on the edges of money coined in his majesty’s mint, their counsellors, procurers, aiders and abettors shall suffer death as in case of high treason.”—And by par. 4. “ whoever shall colour, gild or case over with gold or silver, or with any wash, or materials producing the colour (16) of gold or silver, any coin resembling any the current coin of this kingdom.—or any round blanks of base metal, or of coarse gold, or coarse silver of a fit size and figure to be coined into counterfeit milled money resembling any the gold or silver coin of this kingdom.—Or shall gild over any silver blanks of a fit size and figure, to be coined into pieces resembling the current gold coin of this kingdom, their counsellors, procurers, aiders and abettors shall suffer death as in high treason.

(16) It has been resolved upon this clause of the statute, that it is immaterial whether the colouring is effected immediately, by some external and superficial application, or arise latently by extraction from the application of *Aqua fortis*, or other chymical power. *Rex v. Lacy and Parker. Or B. 6. Dec. 1776.*

Stat. 63. And by f. 5. If any tool, instrument or engine used or designed for coining or counterfeiting gold or silver monies, or any part of such tool or engine, shall be hid or concealed in any place, or found in the house, custody or possession of any person not then employed in the mint, the same may be seized and carried forthwith to some justice of the county or place to be produced in evidence at the trial of the offender; and then defaced and destroyed.— And all false money which shall be so produced, shall be cut in pieces,

Cro. Cir.
Com. 171.

Stat. 64. † And by 15 Geo. 2. c. 28. it is enacted, “ That if any person whatsoever, shall wash, gild, or colour any of the lawful silver coin, called a shilling, or a sixpence, or any counterfeit (17) or false shilling or sixpence, or add to, or alter the impression, or any part of the impression of either side of such lawful or counterfeit shilling or sixpence, with intent to make such shilling or sixpence resemble or look like or pass for a piece of lawful gold coin called a guinea or a half guinea respectively — Or shall file or any wise alter, wash, or colour any of the brass monies called half-pennies or farthings, or add to, or alter the impression, or any part of the impression of either side of a halfpenny or farthing, with an intent to make such halfpenny or farthing resemble, or look like, or pass for a lawful shilling or sixpence respectively. Such offenders, their counsellors, aiders, abettors and procurers shall be guilty of high treason.”

For the rewards given by statute for the apprehending and convicting of felons, *vide* b. 2. c. 12. f. 25. — And for discoverers who are intitled to pardon. b. 2. c. 37. f. 4.

(17) The counterfeit money must be like the true money; for the word counterfeit implies resemblance or likeness and without it, there is very little danger of imposition or fraud. 1 Hale 184. 215. 5 Bac. Abr. 129.

Stat. 65. As to the second branch, concerning the bringing false money into the realm, the following particulars are observable. First, That the money so brought must be counterfeited according to the similitude of English money. But by 1 & 2 Phil. & Mar. c. 11. “ It is made high treason to bring into the realm money counterfeited according to the similitude of foreign coin current here, to the intent to merchandize therewith.”

1 H. 1. 225.
228, 229. 317.
Sum. 21.
S. P. C. 3.
Foster 227.

Stat. 66. Secondly, That it must be brought by one, who knows it to be false.

Stat. 67. Thirdly, That it must be brought from a foreign nation, and not from Ireland, or other place subject to the crown of England, for tho’ to some purposes they be distinct from the realm of England, and consequently money brought from thence may, within the letter of the statute, be said to be brought into the realm, yet inasmuch as the counterfeiting is punishable there by the laws of our king, as much as in England, the bringing money from such places has been construed to be no more within the act than if they were actually in England.

1 Hale 225,
226. 317.
3 H. 7. 12.
S. P. C. 3.
3 Inst. 18.
Sum. 12.
B. Treas. 10.
Dalt. 85. f. 225.

Sum. 21.
3 Inst. 18.
eb. 18. f. 4.

Sec. 68. Fourthly, That the bare uttering of such money here, by one who brought it not over, is not within this branch.—But by force of an ancient statute, if false money be found in the hands of a suspicious person, he may be arrested till he have found his warrant.

3 Inst. 18.
Sum. 21.

Sec. 69. Fifthly, That it is not necessary that such false money be actually paid away or merchandized withal, for the words are, to merchandize or make payment, &c. which only import an intention to do so, and are fully satisfied whether the act intended be performed or not. But *quære*, because both Coke and Hale seem to hold otherwise. However it is clear, that bringing over money counterfeited according to the similitude of foreign coin is treason within 1 & 2 Phil. & Mar. c. 11.

Sec. 70. Also in the said statute of 25 Edw. 3. there is this clause, “ And because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be shewed and declared before the king, and his parliament, whether it ought to be judged treason or other felony.”

1 Hale 308.
3 Inst. 8.
12 Co. 16.

Sec. 71. By virtue of this clause, many offences which are not high treason within this statute, as the murder of an ambassador, &c. were declared by the parliament to be high treason. But these and all other such like declarations are made void by 1 Mary c. 1. And it seems that the parliament have no such power at this day by virtue of the said clause, inasmuch as the said statute of 1 Mary expressly enacts, “ That no offence shall be deemed high treason, but only such as is declared and expressed to be so by 25 Edw. 3.” and takes no notice of the said clause relating to the parliament.

AND now we are come to offences, which have been made high treason since the said statute of 1 Mary. And in treating of these, we shall consider, First, Offences in upholding or favouring the power of the pope. Secondly, Offences against the protestant succession. Thirdly, Offences of lifting men without the king's licence.

And first, Offences in upholding or favouring the power of the pope seem reducible to the following heads: *First*, Extolling the pope's power. *Secondly*, Putting in use popish bulls. *Thirdly*, Perverting others, or being perverted to popery. *Fourthly*, Receiving popish orders or education in popish seminaries, and not submitting, &c. *Fifthly*, Refusing a second tender of the oaths.

Sec.

Stat. 72. And first, The offence of extolling the pope's power is made high treason by 5 Eliz. c. 1. s. 2. 10. by which it is enacted, "That if any person within the queen's dominions, shall by writing, cyphering, preaching or teaching, deed or act, advisedly and wittingly hold or stand with, extol or set forth, maintain or defend, the jurisdiction of the bishop of Rome heretofore claimed in this realm, or by any speech, open deed or act, willingly or advisedly attribute any such authority to the see of Rome, he shall be guilty of a *præmunire* by the first offence, of high treason by the second, but without corruption of blood or loss of dower."

See 1 Hale 331, 332.
Prin. P. L. 144.

Stat. 73. It has been holden, That he, who knowing the effect of a book written beyond sea, brings it over and secretly sells it, and also, That he, who by report hearing the contents thereof commends it, and also, That he, who knowing its contents secretly conveys it to a friend with an intent to pervert him, is in danger of the statute; and it has been resolved, That he, who having read the book does afterwards in discoursing of it, allow it to be good; and also, That whoever writes or prints such a book, and after publishes it, is clearly guilty: but it is said, That he, who having heard of the contents, barely buys and reads the book, is not within the statute.

Dyer 252.

Stat. 74. It has also been holden, That if one who is convicted and condemned for an offence of this nature, being afterwards demanded by the judges, whether he be still of the same opinion? answer, that he is, he is guilty of high treason, as having advisedly maintained the pope's power a second time.

Two of the judges dissented from this opinion. Sav. 46.

Stat. 75. The second offence of this kind, *viz.* That of putting in ure a popish bull, is made high treason by 13 Eliz. c. 2. s. 2, 3. By which it is enacted, "That if any within the queen's dominions shall put in ure any bull or instrument of absolution or reconciliation obtained from the see of Rome, or shall take upon him by colour thereof, to absolve or reconcile any person, or to grant or promise any absolution or reconciliation, or shall willingly receive any such absolution or reconciliation, or shall obtain from the see of Rome any bull or writing whatsoever, or publish, or any ways put the same in ure, he is guilty of high treason. And by s. 4. accessaries after the offence incur a *præmunire*. And by s. 5, 6. Those who within six weeks disclose not an offer of such bulls, &c. to some privy counsellor, &c. are guilty of a misprison of treason."

Prin. P. L. 144.

Stat. 76. The third offence of this kind, *viz.* That of perverting others, or being perverted to popery, is made high treason by 23 Eliz. c. 1. s. 2. & 3 Jac. 1. c. 4. s. 22, 23. by which it is enacted, "That if any one shall pretend to have power 3."

1 Hale 337, 338.
11 Mod. 56.
114.
Rex v. Bolton.
Mich. 26 Geo.

Form of indictment. Cro. Cir. 573. “ power, or shall put in practice to withdraw a subject from
 “ his natural obedience to the king, or to withdraw them
 “ for that intent, to the Romish religion, or to move to promise any obedience to any foreign power, or to do any
 “ overt-act to that intent, or to recconcile one to the see of
 “ Rome, and if any person shall by any means be willingly
 “ withdrawn, or promise obedience as aforesaid, he is guilty of
 “ high treason.”

Cawley 187. *Sec. 77.* But by 3 Jac. 1. c. 4. “ If any person who is
 “ reconciled to the see of Rome beyond the seas, return into
 “ the realm and submit himself, &c. and take the oaths
 “ within six days after his return, he is excused.”

The case of Campion the Jesuit and others. Savil 3. *Sec. 78.* It seemeth that the bare pretending to such a
 power, without any farther act in endeavouring to persuade
 persons from their allegiance, or the bare endeavouring so to
 persuade them, without any pretence of such a power, is
 high treason within these acts.

Hale 336, 337. *Sec. 79.* The fourth offence of this kind, viz. That of
 receiving popish orders or education, &c. is made high
 treason by 27 Eliz. c. 2. s. 3. by which it is enacted, “ That
 “ if any ecclesiastick, born in the queen’s dominions, and or-
 “ dained or professed by popish authority, shall remain in the
 “ queen’s dominions, or come from beyond sea, and not sub-
 “ mit to some bishop or justice of peace within three days,
 “ and take the oaths, &c. he shall be guilty of high treason.”

Sec. 80. And by s. 15. “ If any subject, not being an
 “ ecclesiastick, shall not return from a popish seminary
 “ within six months after a proclamation to that purpose in
 “ London, and submit, &c. within two days, he shall be
 “ guilty of high treason, whenever he shall otherwise return.”

Sec. 81. And by s. 13. “ If any subject shall know that
 “ any such priest is within the realm, and not discover him to
 “ some justice of peace, &c. within twelve days, he shall
 “ be fined and imprisoned at the queen’s will; and if any
 “ justice of peace, &c. to whom such matter shall be
 “ discovered, shall not give information to some of the privy
 “ council, &c. within twenty-eight days, he shall forfeit two
 “ hundred marks.”

Pop. 94. *Sec. 82.* In the construction of this statute it hath been
 resolved, First, That in an indictment grounded on this
 statute against a priest remaining here beyond the time limited
 by the statute, it must be alledged, that he was born in the
 realm, &c. and also that he was ordained, &c. by authority
 challenged or pretended from the see of Rome; but that there
 is no need to shew in what place in particular he was born,
 or whether he were ordained within the realm, or beyond sea.

Ray. 377. *Sec. 83.* Secondly, That one in popish orders, being in a
 ship in order to go to Ireland, and driven by a storm into
 England, and immediately apprehended, is not guilty of high
 treason

treason within this act; for his design of going to Ireland was prevented, & *nil efficit conatus, nisi sequatur effectus*, and he was forced into England by the act of God, and against his will; neither can he be said to remain here within the intent of the statute, because he was compelled to it by reason of the prosecution.

Stat. 84. The fifth offence of this nature, viz. that of refusing a second tender of the oaths, is made high treason by 5 Eliz. c. 1. s. 11, 12 & 20. by which it is enacted, "That if any person, who shall have a charge, cure, or office in the church, or an office or ministry in an ecclesiastical court, or if any person who shall wilfully refuse to observe the rites of the church of England, after having been admonished by the ordinary, &c. or that shall say or hear private mass, &c. shall refuse a second tender of the oaths, he shall be guilty of high treason, but without corruption of blood."

Vide infra, c. 19.
See 1 W. & M. c. 8.

Stat. 85. Secondly, offences against the protestant succession made high treason are twofold: First, denying the power of the parliament to limit the succession of the crown, which is made high treason, by 4 Annæ c. 8. s. 1, 2. and 6 Annæ c. 7. s. 1, 2. whereby it is enacted, "That whoever shall maliciously, advisedly, and directly, by writing or printing, declare, maintain and affirm, that the pretended prince of Wales, or any other, hath any right or title to the crown, otherwise than according to 1 Will. & Mary, sess. 2. c. 2. or 11 & 12 Will. 3. c. 2. or that the kings of this realm, by authority of parliament, are not able to make laws to limit and bind the crown and the descent and government thereof, shall be guilty of high treason, and that those that maliciously and directly affirm the same by preaching, teaching, or advised speaking, shall be guilty of a *præmunire*."

Prin, P. L. 145.
See the case of John Mathews, convicted and executed upon this statute, 9 St. Tr. 11 c. O. B. Oct. Sessions 1719.

Secondly, Endeavouring maliciously, advisedly, and directly to hinder any person, who shall be next in succession, according to 1 Will. & Mary, and 12 Will. 3. which is made high treason by 1 Annæ, c. 17.

Stat. 86. It is also enacted by 13 Will. 3. c. 3. it is recited, "That the said pretended prince of Wales had assumed the title of king of Great Britain, in manifest violation of the lawful and rightful title to this realm; and that the said traitor may be brought to condign punishment," it is ordained, "that he stand and be convicted and attainted of high treason."—And it is also enacted, "That if any subjects of the crown of England, shall hold any correspondence whatsoever with the said pretended prince of Wales, or by 17 Geo. 2. c. 39. with the sons of the said pretender, or knowingly with any person employed by him or them,

"or shall remit or pay any money for his or their use or service, shall be guilty of high treason."

Vide 9 Will. 3. c. 1.
1 Hale 339, 340. and for the offence of enlisting men for the service of any foreign prince vide next chapter f. 11.

Stat. 87. It is also further enacted by 2 & 3 Annæ, c. 20. f. 34. "That if any officer or soldier shall hold correspondence with any rebel or enemy, or give them advice or intelligence either by letters, messages, signs, tokens, or otherwise, or shall treat, or enter into any condition with them, without authority so to do, he shall be guilty of high treason."

CHAPTER THE EIGHTEENTH.

OF FELONIES MORE IMMEDIATELY AGAINST THE KING.

FELONIES more immediately against the king are of five kinds:—First, Offences relating to the coin or bullion.—Secondly, Offences against the king's council.—Thirdly, The offence of passing beyond sea to serve a foreign prince.—Fourthly, Imbezilling the king's armour.—Fifthly, The offence of relieving a popish priest.

Felonies relating to the coin or bullion (1) are of three kinds:—First, The offence of debasing it.—Secondly, The offence of unlawfully diminishing it.—Thirdly, The offence of endeavouring by extraordinary means to increase it.

(1) Bullion is the ore or metal whereof gold is made, and signifies with us either gold or silver in the mass. 9 Edw. 3. c. 2. The king by virtue of his prerogative is entitled to all mines from which it is produced. 2 Inst. 577. Plow. 336. in order to supply materials for the coin of the kingdom. 1 Com. 294. This coin must be made of sterling or standard metal, 25 Edw. 3. (Cowp. 279.) It consists at present of two carrats of copper, melted with twenty-two carrats of fine gold.—And eighteen penny weights of copper, melted with eleven ounces and two penny weights of fine silver respectively. Ward's Math. 118. 12 Geo. 2. c. 26. Even the king's prerogative Sir Edward Coke thinks, does not extend to the alteration of the standard. 2 Inst. 577. Hale says, it is neither safe nor honourable to debase the coin below sterling, 1 vol. 197. and Blackstone apprehends that in legitimating even foreign coin, the value should be fixed comparatively with our own standard, or the consent of parliament will be necessary, 1 Comm. 278. And the legislature appear to have been ever extremely anxious to preserve the standard of the coin and bullion pure and unadulterated. Vide 13 & 14 Car. 2. c. 31. 3 Will. 3. c. 8. 6 Geo. 1. c. 11. 12 Geo. 2. c. 26. 9 Geo. 3. c. 37. 14 Geo. 3. c. 42. 16 Geo. 3. c. 46. 18 Geo. 3. c. 45. and the references there cited.

4 Com. 98.

3 Inst. 92, 93.

Stat. 1. And first, The offence of debasing the coin or bullion was provided against by many ancient statutes, which seem to be obsolete at this day; for the importation of ill money was made felony by 17 Edw. 3. n. 15. (which was never printed,) and so was the payments of blanks, (which were made of base alloy,) by 2 Hen. 6. c. 9. and the coining

or bringing in galley halfpence, feskings or doydekins, by 3 Hen. 5. c. 1. However it is made high treason to bring in false money, &c. by 25 Edw. 3. and 1 & 2 Ph. & Mar. c. 11.

Stat. 2. And it is enacted by 8 & 9 Will. 3. c. 26. f. 6. ^{4 Comm. 98.}
made perpetual by 7 Anne, c. 25. f. 3. ^{1 Hale 314.} "That whoever shall
" blanch copper for sale, or mix blanched copper with silver,
" or knowingly buy or sell, or offer to sale blanched copper
" alone or mixed with silver, and shall knowingly and fraudu-
" lently buy or sell, or offer to sale any malleable composition or
" mixture of metals or minerals which shall be heavier than
" silver, and look, and touch, and wear like standard gold,
" but be manifestly worse than standard; or shall take, re-
" ceive, pay, or put off any counterfeit milled money, or
" any milled money whatsoever unlawfully diminished, and
" not cut in pieces at or for a lower rate or value than the
" same by its denomination doth or shall import, or was
" coined or counterfeited for, shall be guilty of felony."

Stat. 3. And by 9 & 10 Will. 3. f. 21. "Any person to whom
" any silver money, and by 13 Geo. 3. c. 71. any person to whom
" any gold money, shall be tendered, which shall be diminished
" otherwise than by reasonable wearing, or which from the ap-
" pearance of it, he shall suspect to be counterfeited, may cut,
" break or deface the same; but if the same shall afterwards
" appear to have been lawful money, the person who cut, &c.
" shall take the same, at the rate it was coined for; and every
" question respecting the validity of such coin, shall be finally
" determined by the chief magistrate of the place.—And by
" 8 & 9 Will. 3. c. 26. f. 5. such spurious money, produced
" in a court of justice, shall be destroyed in open court.

Stat. 4. It is also further enacted, by 15 Geo. 2. c. 28. f. 2. ^{1 Hale 195.}
"That whoever shall utter or tender in payment any false or ^{211.}
" counterfeit money knowingly, shall suffer six months impri- ^{1 Burn. 367.}
" sonment, and find sureties for good behaviour for six months
" more; and on being convicted a second time for the like of-
" fence, shall suffer two years imprisonment and find sureties,
" &c. for two years more; and if the same person shall offend
" in like manner a third time, he shall suffer death without
" clergy." It is also further enacted by f. 3. "That who-
" ever shall knowingly utter or tender in payment any false
" or counterfeit money, and shall either the same day, or
" within the space of ten days then next, utter or tender in
" payment any more or other false or counterfeit money; or
" shall at the same time have in his custody, one or more
" pieces of counterfeit money besides what was so uttered or
" tendered, shall suffer one years imprisonment and give securi-
" ty, &c. for two years more; and if such person shall offend
" in like manner a second time, he shall suffer death without
" clergy, provided the prosecution be within six months."—
And it is further enacted by f. 4. "That whoever shall make,
" coin, or counterfeit any brass or copper money called a
" halfpenny

“ halfpenny or a farthing, their aiders, &c. shall suffer two years imprisonment, and find surety, &c. for two years more.”

O. B. 1784.
p. 484.

Stat. 5. And it is further enacted, by, 11 Geo. 3. c. 40. “ That whoever shall make, coin, or counterfeit any of the copper monies of this realm commonly called an halfpenny or a farthing, his counsellors, aiders, abettors, and procurers shall be adjudged guilty of felony.” — And it is further enacted by s. 2. “ That whoever shall buy, sell, take, receive, pay, or put off any counterfeit copper money, not milled down or cut in pieces, at or for a lower rate or value, than the same by its denomination, doth or shall import or was counterfeited for, shall be guilty of felony.” — And by s. 3. “ Any one justice of the peace, on complaint upon oath of one witness by warrant under his hand may cause the houses, &c. of suspected counterfeiters to be searched for the tools and implements for coining such copper monies, in order to produce them in evidence against the offenders as aforesaid.”

Paph. 149.
Hob. 270.

3 Inst. 92, 93.

Stat. 6. Secondly, The offence of diminishing the coin or bullion of the kingdom has been always thought to be of very ill consequence, as tending to impoverish the nation, and to embarrass trade, and with an eye to those inconveniences it was made felony by 17 Edw. 3. n. 15. (which was never printed) to transport silver, except plate carried over by great men to serve their houses; also the transportation thereof was prohibited by many other statutes, as 27 Edw. 3. c. 14. 5 Rich. 2. c. 2. 2 Hen. 4. c. 16. 2 Hen. 6. c. 6. and 3 Hen. 8. c. 1. But this general restraint being found by experience to be inconvenient to trade; which by exporting money to one market may bring back such goods, as will more than make up the loss, from another, it was enacted by 15 Car. 2. c. 7. s. 12. “ That any person might export any foreign coin or bullion without duty, first making an entry thereof in the custom-house.”

Stat. 7. But this licence having been often abused by the transportation of such silver, which having been coined into English money or wrought into plate, was afterwards melted down into the form of foreign coin or bullion, it was, in order to prevent this mischief, enacted by 6 & 7 Will. 3. c. 17. s. 3. “ That none shall cast or make ingots or bars of silver in imitation of Spanish under pain of five hundred pounds.” And it is further enacted by the said statute, s. 5. “ That no person shall transport, or cause to be transported, any molten silver, but only such as shall be marked or stamped at Goldsmith’s Hall, &c. nor even that without a certificate under the hands of one of the wardens of the Goldsmith’s Company, that oath hath been made by the owner or owners thereof, and likewise by one credible witness, that the same is lawful silver; and that no part thereof was (before the same was molten) the

the same

"current coin of this realm, nor clippings thereof, nor plate wrought within this kingdom, &c."

Sec. 8. Also it is farther enacted, f. 6. "That any officer of the custom-house may seize any molten silver, which shall be put on board any vessel, without having such mark or stamp, and also such certificate, as is above mentioned."

Sec. 9. And it is farther enacted, f. 7. "That if any broker, not being a trading goldsmith, or refiner of silver, shall buy or sell any bullion or molten silver, he shall suffer imprisonment for six months without bail."

Sec. 10. Also it is farther enacted, f. 13, 14. "That if a doubt shall arise upon bullion shipped to be exported, whether the same be English or foreign, the proof shall lie upon the owner, &c. And that if any person shall enter or ship any bullion, by the said act allowed to be exported, other than in the name of the true owner, prior or importer, the exporter shall forfeit the same, or the full value thereof."

Sec. 11. Also it is farther enacted by 7 and 8 Will. 3. c. 19. f. 6. "That no person shall ship or cause to be shipped, any molten silver, or bullion whatsoever, unless a certificate be first had and obtained from the court of the Lord Mayor and Aldermen of the city of London, oath having been made, before the said court, by the owners and two witnesses, that the same was and is foreign bullion, and that no part thereof was the coin of this realm or the clippings thereof, nor plate wrought within the kingdom, &c. which oath, &c. the said court shall (circumstantially) certify to the commissioners of the customs, before any coquet shall be granted for shipping the same; on pain to the owner of loss of the goods and forfeiting double the value. To the captain the ship, and 200 l. and if in the king's service, the loss of command. To the coquet officer 200 l. and loss of office."—

By 20 Geo. 3.
c. 18.
Gold and silver
coin may be
exported to
Ireland.

Sec. 12. Thirdly, The endeavours of some persons in making use of extraordinary methods for the producing of gold and silver, were found by experience to be so prejudicial to the publick, both from the lavish waste of many valuable materials, and also from the ruin of many families, which had been occasioned by such useless expences, that it was thought necessary to put a check to such practices by some severe law, and for that purpose it was made felony, by 5 Hen. 4. c. 4. "To multiply gold or silver, or to use the art or craft of multiplication." And it was holden, That the practising to find out the Philosophers Stone, by which it is imagined that all metals may be made gold, was felony within this statute: but this restraint having been found to have

1 Hale 644.
Dyer 88.

have no other effect, upon the unaccountable vanity of those who fancied such attempts to be practicable, but only to send them beyond sea, to try their experiments with impunity in other countries, the statute of 5 Hen. 4. was at last wholly repealed by 1 Will. & Mary c. 30.

4 Comm. 100.
3 Comm. 332.
Ante ch. 17.

Sec. 13. As to the second kind of felonies more immediately against the king, viz. those which are against his council, it is enacted by 3 Hen. 7. c. 14. "That if any sworn servant in the chequer-roll of the king's household, under the state of a lord, make any confederacy, compassing, conspiracy or imagination with any person, to destroy or murder the king, or any lord of this realm, or any other person sworn to the king's council, he shall be guilty of felony."

1 Hale 230.
4 Com. 84.

Sec. 14. And it is farther enacted by 9 Annæ, c. 16. "That if any person shall attempt to kill, assault, strike or wound any privy-counsellor in execution of his office, he shall suffer as a felon without clergy."

3 Inst. 80.
Dalt. c. 107.
Cawl. 182.

(a) N. B. This oath of obedience is taken away by 1 Will. and Mary, sess. 1. c. 8. f. 2. and the new oaths of allegiance and supremacy enjoined in the room thereof. Vide 10 20. f. 41.

Sec. 15. As to the third offence of this kind (viz.) That of passing beyond sea to serve a foreign prince, it is enacted by 3 Jac. 1. c. 4. f. 18, 19, 20, 21. "That every subject, who shall go out of the realm to serve any foreign prince or state, or shall pass over the seas, and there voluntarily serve any such foreign prince or state, not having before his going taken the oath of obedience (a) shall suffer as a felon; and that if any gentleman, or person of higher degree, or any person who hath born any office or charge in camp or army, shall go out of the realm to serve such foreign prince, &c. without being bound with two sureties in a bond, conditioned, that he shall not be reconciled to the see of Rome, nor enter into any conspiracy against the king, he shall be a felon."

Sec. 16. † And it is enacted by 9 Geo. 2. c. 30. "That if any subject of the crown of Great Britain shall within Great Britain or Ireland, enlist or enter himself, or if any person shall procure any subject of his majesty, to enter or enlist himself, or hire or retain such person with an intent to cause him to enlist or enter himself, or procure any subject to go beyond the seas, or embark with an intent, and in order to be enlisted to serve any foreign prince, &c. as a soldier, without licence so to do under the sign manual, (although no enlisting money hath been or shall be actually paid to or received by him, 29 Geo. 2. c. 17. f. 4.) such offender shall be guilty of felony without clergy.—Unless within fourteen days he voluntarily discover upon oath the person by whom he was so enlisted, invigled or enticed as aforesaid, so as he may be apprehended and convicted."

Stat. 17. † Also it is further enacted by 29 Geo. 2. c. 17.
 “ That if any subject of the crown shall take or accept of
 “ any military commission or otherwise, enter into the mili-
 “ tary service of the French king, as a commissioned or non-
 “ commissioned officer with such licence as aforesaid, he shall
 “ suffer death as a felon without clergy.”

And it is also enacted, f. 5. “ That if any subject shall ac-
 “ cept of commissions in the Scotch brigade, in the service of
 “ the States General, &c. he shall, within six months from
 “ the date of his commission, take and subscribe the oaths of
 “ allegiance and abjuration, and transmit a certificate thereof
 “ to the Secretary at War, &c. or on default thereof shall for-
 “ feit five hundred pounds, one moiety to the king, the other
 “ to the prosecutor, &c.”

And it is further enacted by 1 Geo. 1. c. 47. “ That if
 “ any person shall persuade a soldier to desert, he shall forfeit
 “ the sum of forty pounds, suffer six months imprisonment,
 “ and be set on the pillory.”

Stat. 18. As to the fourth offence of this kind, viz. That
 of imbezilling the king's armour, it is enacted by 31 Eliz.
 c. 4. “ That if any person having the charge or custody of
 “ the king's armour, ordnance, or munition, &c. or of
 “ any victuals provided for the victualling of any soldiers or
 “ mariners, &c. shall for lucre and gain, or wittingly, ad-
 “ visedly and of purpose to hinder or impeach the king's
 “ service, imbezil, purloin, or convey away any of the same
 “ armour, &c. to the value of twenty shillings, he shall be
 “ judged guilty of felony.” But such offender must be pro-
 “ secuted within the year next after the offence done; neither
 “ shall he forfeit his hereditaments any longer than during his
 “ life; nor shall his blood be corrupted, or his wife lose her
 “ dower.

and punishment of peculations under the value of 20 s. Vide 9 & 10 Will. 3. c. 4. 25. 9 Geo. 1. c. 28. 17 Geo. 2. c. 40. f. 10. 9 Geo. 3. c. 30. f. 15.

Vide also
 18 Hen. 6.
 c. 19.
 5 Eliz. c. 5.
 2 & 3 Edw. 6.
 c. 2. by which
 desertion in time
 of war is made
 a capital crime.

For the offence
 and punishment
 of seducing arti-
 ficers, &c. Vide
 Index title Ar-
 tificer.

4 Comm. 101.
 4 Burn 254.
 3 Inst. 78.
 Cawley 90.
 The benefit of
 clergy is taken
 from this of-
 fence and from
 the offence of
 stealing the
 king's naval
 stores, to the
 value of twenty
 shillings, by
 22 Car. 2. c. 5.
 And for the pre-
 servation of the
 stores, and the
 mode of trial
 41. 5 Geo. 1.
 L. Ray. 1104.

Stat. 19. And it is also enacted by 12 Geo. 3. c. 24.
 “ That whoever shall either within this realm, or in any of
 “ the countries or places thereunto belonging, wilfully and
 “ maliciously set on fire and burn, or otherwise destroy, or
 “ shall cause the same to be done, or shall aid or assist in the
 “ setting on fire, burning or otherwise destroying of any of his
 “ majesty's ships or vessels of war, whether on float or building
 “ in any of his majesty's dock yards, or building or repairing
 “ by contract in any private yards for the king's use.—Or any
 “ of his majesty's arsenals, magazines, dock yards, rope yards,
 “ victualling offices, or any of the buildings erected therein, or
 “ belonging thereto; or any timber or materials there placed,
 “ for building, repairing, or fitting out of ships or vessels;
 “ —Or any of his majesty's military, naval, or victualling
 “ stores, or other ammunition of war, or any place or places
 “ where

“ where an such stores or ammunition shall be kept or deposited, shall suffer death without clergy.”

Stat. 20. And it is also enacted by 22 Geo. 2. c. 33. f. 24. “ That every person in the fleet who shall waste, imbezil, or not carefully preserve any powder, shot, ammunition or other stores and provisions, their abettors, buyers and receivers, (being persons subject to naval discipline), shall suffer such punishment as by a court martial shall be found just in that behalf.”—And by f. 25. “ Every person in the fleet who shall unlawfully burn or set fire to any magazine, or store of powder, or ship, boat, ketch, hoy or vessel, or tackle, or furniture thereunto belonging, not then appertaining to an enemy, pirate or rebel, on conviction by court martial, shall suffer death.”

Stat. 21. As to the fifth offence of this kind, viz. That of relieving a popish priest, it is enacted by 27 Eliz. c. 2. f. 4. “ That whoever shall wittingly and willingly receive, relieve, comfort, aid or maintain any Jesuit, seminary or other popish priest, &c. being at liberty or out of hold, knowing him to be such a Jesuit, &c. shall for such offence be adjudged a felon without benefit of clergy.”

CHAPTER THE NINETEENTH.

OF PRÆMUNIRE.

For the history of Præmunire, see 4 Comm. c. 8.

OFFENCES more immediately against the king, not capital, come generally under the titles of *præmunire*, misprision, and contempts. In treating of *præmunire* I shall consider,—First, What offences come under this notion.—Secondly, How they are punished.

And first, Offences coming under the notion of *præmunire*, seem to be reducible to the following general heads; First, Offences against the prerogative of the crown. Secondly, Offences against the authority of the king and parliament.

Those of the first kind seem to come under the following particulars; 1. Making use of papal bulls. 2. Derogating from the king's common law courts. 3. Appealing to Rome from any of the king's courts. 4. Exercising the jurisdiction of a suffragan without the appointment of the bishop of the diocese. 5. Refusing to elect or consecrate the person nominated by the king to a bishoprick. 6. Maintaining the pope's power. 7. Bringing in *Agnus Dei*. 8. Contributing to the maintenance of a popish seminary. 9. Refusing the oaths.

Sett. 1. But inasmuch as these offences depend chiefly upon statutes made for the preservation of the sovereignty of the crown from the incroachments of the see of Rome, I shall, in order to shew the reasonableness of these laws, take a short view of those usurpations, which made them necessary.

Sett. 2. It is the general opinion, that Christianity was first planted in this island by some of the eastern church, which is very probable, from the antient Britons observing Easter always on the fourteenth day of the month, according to the custom of the east.

Sett. 3. But the Saxons being converted about the year 600. by persons sent from Rome, and wholly devoted to the interest thereof, it cannot be expected that such an opportunity of enlarging the jurisdiction of that see should wholly be neglected.

Sett. 4. And yet Parsons, in his attempt to answer Sir Edward Coke's fifth report concerning the king's ecclesiastical authority, is scarce able to produce any instances of the papal power in this kingdom before the Norman Conquest. Indeed he tells us, that four or five persons were made bishops by the pope at the first conversion, but offers not any example thereof between the year 669 and the conquest; and it is certain, that all bishopricks were then conferred by the king's delivery of a ring and a pastoral staff.

Sett. 5. Neither is he able to produce any instance, that looks like an appeal to Rome before the conquest, except in the case of two bishops, and he is forced to own, that even one of the bishops was deposed by two kings, and could get no relief against either of them, notwithstanding the pope's utmost application in his favour.

Sett. 6. Nor can he shew more than four or five instances of exemptions from ordinary jurisdiction, granted or confirmed by popes to religious houses in those days, which plainly shews that this concurrence was not thought necessary; and it appears, that our ancient kings, of their own authority, exempted some abbeys from episcopal jurisdiction; and it hath always been a received rule, even in the times of popery, that the chancellor shall visit a church of the king's foundation, notwithstanding it be not specially exempted.

Sett. 7. But the pope, having favoured and supported William the First in his invasion of the kingdom, took that opportunity of enlarging his incroachments, and in this king's reign began to send his legates hither; and prevailed at first with Henry the First, and afterwards with king John, to give up the donation of bishopricks; and, in the time of king Stephen gained the prerogative of appeals, and in the time of Henry the Second, exempted all clerks from the secular power.

Sett. 8. Indeed this king did at first strenuously withstand these innovations, and abolished most of them by the constitutions

Dav. 83. 88.
Seld. Jan. Ang.
27.
4 Comm. c. 8.

Parsons, c. 6.
p. 12. to 25.
57 to 60.
Barrow 258. to
262.
1 R. Abr. 382.
1 Inst. 134.
344.
Seld. Ja. Ang.
423 65.

Parf. c. 6.
p. 29, to 32.
50. to 56.
Barrow 242. to
258.
Seld. Ja. Ang.
59. 67, 68.

Parf. c. 6. p.
37 to 48.
1 H. 7. 25.
21 E. 3. 60.
1 Inst. 144.
F. N. B. 42.
27 E. 3. 83.
6 H. 7. 14.
2 R. Abr. 230,
231.

Davis 89.
Davis 90, 93.
2 Roll. 103.
Palm. 25, 26.
Seld. Ja. Angl.
67.

Seld. Epinomis,
c. 8.
Davis 91.

tutions of Clarendon: but upon the death of Becket, who, for having violently opposed the king, was slain by some of his servants, the pope got such an advantage over the king, that he was never after able effectually to execute those laws.

Sec. 9. And not long after this, by a general excommunication of the king and people, for several years, because they would not suffer an archbishop to be imposed upon them, king John was reduced to such straits, that he was obliged to surrender his kingdoms to the pope, and to receive them again, to hold of him for the rent of a thousand marks.

2 Inst. 584.
Davis 95.

Sec. 10. And in the following reign of Henry the Third, partly from the profits of our best church benefices, which were generally given to Italians, and others residing at the court of Rome, and partly from the taxes imposed by the pope, there went yearly out of the kingdom seventy thousand pounds sterling.

2 Inst. 580.

Sec. 11. The nation being under this necessity was obliged to provide for the prerogative of the prince and the liberties of the people, by many strict laws. And in the reign of Edward the First, religious houses were prohibited under high penalties, to send any thing to their superiors beyond seas; and it was declared by parliament, that the pope's taking upon him to dispose of English benefices to aliens was an incroachment not to be endured; and soon after these grievances produced those more severe laws against the above mentioned offences of this nature, the particulars whereof are before set forth.

Stat. 6th.

Reg. 64.

3 Inst. 127.

27 Ed. 3. f. 1.

c. 1.

38 Ed. 3. f. 1.

c. 4.

Stat. 2. c. 1, 2,

3, 4.

Seld. in Flet.

10. 4.

3 Rich. 2. c. 3.

7 Rich. 2. c.

12.

12 Rich. 2.

c. 15.

Sec. 12. And first the offence of making use of papal bulls is made a *præmunire* by many ancient as well as later statutes; for it is enacted by 25 Edw. 3. called the statute of provisors, "That whoever shall, by a Papal provision, disturb any patron to present to a benefice, &c. shall be fined "and imprisoned till he make full renunciation, &c." And it is further enacted by 25 Edw. 3. ft. 5. c. 22. "That if "any one purchase a provision of an abbey or priory, he "shall be out of the king's protection." And by 38 Edw. 3. & 12 Rich. 2. c. 15 & 13 Rich. 2. ft. 2. c. 2. "That "whoever shall accept a benefice contrary to 25 Edw. 3. "shall be banished." And by 13 Rich. 2. ft. 2. c. 3. "That "whoever shall bring a sentence of excommunication against "any person, for executing the said statute of 25 Edw. 3. shall "suffer pain of life and member." And by 16 Rich. 2. c. 5. "That whoever shall purchase or pursue, or cause to be purchased or pursued, in the court of Rome or elsewhere, any "translations, processes, sentences of excommunication, bulls, "instruments, or other things, contrary to the tenor of that "statute, which touch the king, against him, his crown, "his regality, or his realm, or bring them within this realm, "or receive them, &c. shall be out of the king's protection "and their lands and tenements, goods and chattels forfeited

" 10

“ to the king; and they shall be attached by their bodies,
 “ &c.” And by 2 Hen. 4. c. 3. “ That whoever shall
 “ purchase from Rome a provision of exemption from ordinary
 “ obedience,” and by 2 Hen. 4. c. 4. “ That whoever
 “ shall put in execution bulls purchased by those of the order
 “ of Cîteaux to be discharged of tithes, shall incur the like
 “ penalty.” Also offenders of this nature are farther restrained
 by 6 Hen. 4. c. 1. 7 Hen. 4. c. 8. 9 Hen. 4. c. 8. &
 3 Hen. 5. c. 4. By which the statutes above mentioned are
 enforced and explained. And it is farther enacted by 23 Hen.
 8. c. 21. f. 22. “ That whoever shall sue for or execute
 “ any licence, dispensation, or faculty, from the see of
 “ Rome;” and by 28 Hen. 8. c. 16. (by which all bulls,
 “ briefs, &c. heretofore obtained from Rome, are made void.)
 “ That whoever shall use, alledge, or plead the same in
 “ any court, unless they were confirmed by that statute, or
 “ afterwards by the king, shall incur the like penalty.” Yet
 it hath been holden, That the alledging of an ancient bull in
 order to induce another principal matter, whereon to ground
 a title without claiming any thing from the bull itself, is not
 within this statute. ^{2 Lev. 251.}

Stat. 13. By 13 Eliz. c. 2. Those who purchase any
 bull, &c. from Rome, are guilty of high treason. But those
 ancient statutes still continue in force; and it is in the elec-
 tion of the crown to proceed either upon them, or 13 Eliz.
 Also by the said statute of 13 Eliz. “ The aiders, comforters,
 “ and maintainers of such offenders after the offence, to the
 “ intent to uphold the said usurped power, incur a *præmunire*.”

Stat. 14. The second offence of this nature, *viz.* That
 of derogating from the king’s common law courts, is said to
 have been a high offence at common law, and is made a
præmunire by many ancient statutes; for by 27 Edw. 3. c. 1.
 & 38. Edw. 3. of provisors, “ If any subject draw any out of
 “ the realm in plea, whereof the cognizance pertains to
 “ king’s court, or of things whereof judgments be given in
 “ the king’s court, or sue in any other court, to defeat or
 “ impeach the judgments given in the king’s court, he shall
 “ be warned to appear, &c. in proper person, at a day con-
 “ taining the space of two months; at which, if he appear
 “ not, he and his proctors, &c. shall be put out of the
 “ king’s protection, his lands and chattels forfeited, his body
 “ imprisoned and ransomed at the king’s will, &c.”

Stat. 15. And by 16 Rich. 2. c. 5. “ Both those who
 “ shall pursue or cause to be pursued in the court of Rome
 “ or elsewhere any processes or instruments, or other things
 “ whatsoever which touch the king, against him, his crown,
 “ and regality, or his realm, and also those who shall bring,
 “ receive, notify, or execute them, and their abettors, &c.
 “ shall be put out of the king’s protection, &c.”

Stat.

¹ Hale 643.
Vide sup. c. 17.
 Davis 84.

² R. Ab. 176.
 Raft. 466.
 B. 2. c. 48. f. 9.
³ Inst. 125.
 B. Premu. 3.

2 Bulst. 299.
3 Inst. 125.
C. Jac. 336.

Señ. 16. In the construction of these statutes it was holden, That certain commissioners of sewers for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *præmunire*.

3 Inst. 123.
4 H. 4. c. 23.
2 Cha. Caf. 97.
D. 201, 301.
1 Lev. 241.
Hard. 125.
1 D. Abr. 764.
1 Sid. 463.
1 Mod. 59.
3 Keb. 221.

Señ. 17. Also there have been formerly many strong opinions, That suits in equity to relieve against a judgment at law, are within these statutes; especially if the end thereof be to controvert the very point determined at law, or to seek relief after judgment in a case wherein the law may relieve, as against excessiveness of damages, &c. But it seems to be generally agreed at this day, That no such suit is within the intention of the said statutes.

2 Bulst. 299.
1 Roll. 190.
(c) 3 Inst. 120,
121, 122.
B. Præmun.
5. 12. 16. 31.
15 H. 7. 9.
12 Co. 37.
2 R. Abr. 177.
Moor 838.
C. Jac. 134.

Señ. 18. It hath been said, That suits in the admiralty or ecclesiastical courts within the realm are within 16 Rich. 2. c. 5. (by force of those words, *or elsewhere*,) if they concern matters, the cognizance whereof belongs to the common law; as where a bishop deprives an incumbent of a donative, or excommunicates a man for hunting in his parks, &c. or where (c) commissioners of sewers imprison a man for not releasing a judgment at law.

Señ. 19. But it seemeth, That a suit in those courts for a matter which appears not by the libel itself, but only by the defendant's plea, or other matter subsequent, to be of temporal cognizance, (as where a plaintiff libels for tithes, and the defendant pleads that they were severed from the nine parts, by which they became a lay-fee,) is not within the statute, because it appears not that either the plaintiff or the judge knew that they were severed.

Señ. 20. The third offence of this nature, *viz.* That of appealing to Rome from any of the king's courts, is made a *præmunire* by 24 Hen. 8. c. 12. and c. 20, 21. and 25 Hen. 8. c. 19. by which it is enacted "That all such appeals as formerly were made to Rome, shall from henceforth be made to the high court of chancery."

Señ. 21. The fourth offence of this nature, *viz.* That of exercising the jurisdiction of a suffragan, without the appointment of the bishop of the diocese, is made a *præmunire* by 26 Hen. 8. c. 14. which sets forth at large for what towns such suffragans may be nominated by the king, and also how they may be nominated, consecrated, and commissioned.

Señ. 22. The fifth offence of this nature, *viz.* That of refusing to elect or consecrate the person nominated by the king to a bishoprick, is made a *præmunire* by 25 Hen. 8. c. 20. f. 7. by which it is enacted, "That if any dean and chapter refuse to elect the person named in the king's letter for a bishoprick, and to signify such election to the king within twenty days after the licence shall come to their hands, or if any archbishop or bishop after such election (or nomination)

" nomination by the king in default thereof signified unto them by the king,) shall refuse within twenty days to conform and consecrate the person so signified to them, they incur a *præmunire*."

Stat. 23. The sixth offence of this nature, viz. That of maintaining the pope's power, is made a *præmunire* upon the first conviction, and high treason upon the second. 5 Eliz. c. 1.

Stat. 24. The seventh offence of this nature, viz. That of bringing in *Agnus Dei*, is made a *præmunire* by 13 Eliz. c. 2. f. 7, 8. by which it is enacted. " That if any one shall bring into the realm, &c. any *Agnus Dei*, crosses, pictures, beads, or such like superstitious things, pretended to be hallowed by the bishop of Rome; &c. and shall deliver or offer the same to any subject to be worn or used in any wise; or if any one shall receive the same to such intent, and not clear himself by discovering the offender, &c. he shall incur a *præmunire*." Cawley 52, 53. Vide 3 Jac. c. 5. f. 25. as to the penalty of importing, popish books. Ante, Ch. 15. f. 15.

Stat. 25. And so shall a justice of peace in the same county, who having any offence in that act declared unto him, shall not declare it to a privy counsellor, within sixteen days. Cawley 54.

Stat. 26. The eighth offence of this nature, viz. That of contributing to the maintenance of a popish seminary, is made a *præmunire* by 27 Eliz. c. 2. f. 6.

Stat. 27. The ninth offence of this nature, viz. That of refusing the oaths, is made a *præmunire* by several statutes; for by 1 Eliz. c. 1. f. 19. it is enacted, " That all ecclesiastical persons, and all ecclesiastical and temporal officers, and all persons having the king's fees or wages; and by f. 26. That all persons taking orders, or any degree in any university within the realm, shall take the oath of supremacy, under pain of losing their benefices and offices." N. B. The 1 Eliz. c. 1. as far as concerns the oaths is repealed by 1 W. & M. c. 8. f. 2.

And it is further enacted by 5 Eliz. c. 1. f. 5. " That all the persons above mentioned who are required by the said statute of 1 Eliz. c. 1. to take the said oath, and all schoolmasters, publick and private, barristers, benchers, readers, ancients in any house of court, &c. attornies, sheriffs, and officers belonging to the common or any other law, or to the crown, or to any court whatsoever, shall take the said oath in open court, before they shall be admitted to any such vocation or office, &c. And if they belong not to any court, that then they shall take the same before such person as shall admit them to such vocation, &c. or before commissioners appointed under the great seal, &c."—

And it is farther enacted f. 6. " That any bishop may tender the said oath to any spiritual person within his diocese,"

“ diocese, as well in places exempt as others ;” and by f. 7.
 “ That commissioners may be appointed by the Lord Chan-
 cellor to tender the same to such persons as by their com-
 mission they shall be authorized to tender it unto.”

And by f. 8. “ That if any person, compellable by
 “ either of the said acts, or appointed by such commissioners
 “ to take the said oath, shall refuse to take it on a tender
 “ thereof, he shall incur a *præmunire*.”

And by f. 9. “ That such refusal shall be certified with-
 “ in forty days before the king in his court of King’s Bench,
 “ by those who have authority to tender the said oath, under
 “ the penalty of one hundred pounds ; and that the sheriff
 “ of the county wherein the said court shall sit, may impanel
 “ a jury, who shall inquire of such refusal, in such manner
 “ as if it had happened in the same county.”

Raym. 212.
 1 Ven. 171.
 2 Keb. 825.

Sec. 28. In the construction of these statutes it hath been
 resolved : First, That the obligation to take the said oath
 continued after the death of queen Elizabeth, tho’ the
 statutes say nothing of her successors ; and the like resolution
 also has been made in relation to the oaths appointed by sub-
 sequent statutes.

Raym. 445.

Sec. 29. Secondly, That in a commission authorising persons
 to tender the said oath, a general description of the persons to
 whom it shall be tendered is sufficient, without naming
 them particularly by their names.

Dyer 234.

Sec. 30. Thirdly, That if the person who tendered the oath
 as bishop, was not a bishop at that time, the defendant may
 give it in evidence upon the general issue.

1 Bulst. 197,
 198.
 2 Bulst. 290.
 1 Ven. 172,
 173.

Sec. 31. Fourthly, That the said oath must in substance
 be taken in the very words expressed in the acts, and cannot
 be qualified with any reserve whatever : yet it hath been re-
 solved, That to use the words, *In conscience*, instead of, *in my*
conscience, or *sea* of Rome, instead of *see* of Rome, makes no
 material variance.

Raym. 445.

Sec. 32. Fifthly, That a certificate of a refusal of the
 said oath made to the judges of the said court of the King’s
 Bench by name, and not to the king in his said court, is
 sufficient within the meaning of the statute.

Dyer. 234. 363.

Sec. 33. Sixthly, That an ecclesiastical person is well
 described in such a certificate by the addition of *legum doctor*,
 & *sacris ordinibus constitutus*, without adding *clericus*, &c.

Dyer 234.

Sec. 34. Seventhly, That such a certificate being enter-
 ed of record, as brought into court such a day and year *per*
A. B. Cancellar. of such a bishop, is good, without entering
 that it was so brought *per mandatum episcopi*.

Dyer 234.

Sec. 35. Eighthly, That the trial must be by a jury of
 the county, wherein the oaths were refused ; for the statute
 only authorises an indictment by a jury of the county, where
 in the court sits.

Stat. 36. Ninthly, That any mis-recital of the very words of the oath, in an indictment for not taking it is erroneous. See the books above cited.

Stat. 37. By 3 Jac. 1. c. 4. f. 13, 14. "Any bishop, or two justices of peace, whereof one is to be of the quorum, might tender the oath of obedience therein prescribed, to any person above the age of eighteen years, being under the degree of nobility, and convicted or indicted of recusancy, or not having received the sacrament twice in the year past, and also to any suspected stranger who shall not purge himself upon oath; and shall certify the names of such as take the said oath to the next Quarter-Sessions, and commit those who refuse it till the next Assizes or Sessions, where the same shall be again tendered; and if the said persons, or any other persons whatsoever of the age of eighteen years, other than noblemen or noblewomen, shall there refuse to take it, they incur a *præmunire*, unless they be *femes covert*, who shall be committed till they take it." The 3 Jac. 1. c. 4. as far as concerns the oaths, is repealed by 1 W. & M. c. 8. §. 2.

Stat. 38. By f. 41. "The lords of the council in like manner may tender the said oath to any nobleman or woman, of the age of eighteen years, who refusing the same, incur a *præmunire*, *femes covert* excepted."

Stat. 39. By 7 Jac. 1. c. 6. f. 2. 26, 27. "All persons whatsoever, as well ecclesiastical as temporal, of what estate, dignity, pre-eminence, sex, quality or degree soever, he or she shall be, above the age of eighteen years, being in that act mentioned and intended, shall take the said oath; and any privy counsellor or bishop, within his diocese, may require any baron or baroness, of the age of eighteen years, and any two justices of the peace, whereof one to be of the quorum, may require any other person of that age to take it.—And if any person of or above the said age and degree shall be presented, &c. for not coming to church, &c. then three of the privy council, whereof the Lord Chancellor, &c. to be one, shall require such person to take the said oath.—And if any person whatsoever, of the said age and under the said degree, shall be presented, &c. for not coming to church, &c. or if the minister, &c. shall complain to any justice of peace, &c. and the justice shall find cause of suspicion; then any one justice of peace shall require such person to take the said oath, &c. And all such persons refusing a tender of the said oath, shall be bound over to the Assizes or Sessions, where, if they refuse again, they incur a *præmunire*." And f. 27. "All such refusers are disabled to execute any publick place of judicature, or bear any other office, (being no office of inheritance or ministerial function) or to practise he common or civil law, physick or surgery, or the art of an apothecary." Skin. 12.
Vide 16 Geo. 2. c. 30.
See Cawley 246, &c.

12 Co. 130, 131.

Sec. 40. In the construction of these statutes it hath been resolved, That the justices of peace, &c. may send their warrant to bring such persons before them, but that they cannot authorise the constable to break open the doors to take them.

Vide 1 Geo. 2.

c. 13.

6 Geo. 3. c. 53.

Sec. 41. But by 1 William & Mary c. 8. the oaths of supremacy and obedience, prescribed by these acts, were abrogated; and the following oath and declaration substituted in their room.—“ I *A. B.* do sincerely promise and swear, “ That I will be faithful and bear true allegiance to his “ majesty king George.”—“ I *A. B.* do swear, That I “ do from my heart abhor, detest and abjure, as impious “ and heretical, that damnable doctrine and position, that “ princes excommunicated or deprived by the pope, or any “ authority of the see of Rome may be deposed or murdered “ by their subjects or any other whatsoever.” “ And I do “ declare, that no foreign prince, person, prelate, state, or “ potentate, hath or ought to have any jurisdiction, power, “ superiority, pre-eminence or authority ecclesiastical or civil “ within this realm.”

Vide ch. 24.

Sec. 42. And by s. 3, 4, 5. “ All persons who are required to take, or authorised to tender the said abrogated oaths, or either of them, are in like manner required and authorised to take and tender the said oath and declaration, under the same penalties, &c.”

Vide ch. 24. s. 7.

1 Comm. 368.

4 Comm. 115.

116, 123.

Sec. 43. By 7 Will. 3. c. 24. “ Serjeants at law, “ counsellors, attornies, solicitors, proctors, clerks or notaries, practising as such in any court whatsoever, without “ taking the said oaths and subscribing the said declaration, “ incur a *præmunire*.”

Sec. 44. And now I am in the second place to consider those offences against the authority of king and parliament, which come under the notion of *præmunire*; as to which it is enacted by 6 Ann. c. 7. “ That if any person shall maliciously and directly, by preaching, teaching, or advised “ speaking, declare, maintain and affirm, that the pretended “ prince of Wales, hath any right or title to the crown of “ these realms, or that any other person or persons hath or “ have any right or title to the same, otherwise than according to 1 Will. & Mar. c. 2. and 12 Will. 3. c. 2. and the “ acts then lately made in England and Scotland, mutually “ for the union of the two kingdoms; or that the kings or “ queens of this realm, with the authority of parliament, “ are not able to make laws to limit the crown and the descent, &c. thereof, shall incur a *præmunire*.”

14 Comm. 117.

1 Bullst. 199.

Co. Lit. 129.

3 Inst. 125, 218.

B. 2. p. 444.

Sec. 45. As to the second general point of this chapter, viz. In what manner offences of this nature are punished. It is to be observed, That most of the statutes of *præmunire* refer the punishment to 16 Rich. 2. c. 5. which enacts, that those

who offend against the purport thereof "shall be put out of the king's protection, and their lands and tenements, goods and chattels forfeited to our lord the king: and that they be attached by their bodies, if they may be found, and brought before the king and his council, there to answer to the cases aforesaid, or that process be made against them by *præmunire facias*, in manner as is ordained in other statutes of provisors."

Stat. 46. Inasmuch as this statute expressly saith, that such offenders shall be put out of the king's protection, and also the statute of 25 Edw. 3. f. 5. c. 22. had farther added, "That any one might do with a purchaser of the provisions, therein prohibited, as with the king's enemy, and that he who should offend against such a one in body, lands, or goods, should be excused," it was formerly holden, That a person attainted in a *præmunire* might lawfully be slain by any one, as being the king's enemy, and out of the protection of the laws; but the latter opinions seem to have disapproved of this severity. However, it is expressly enacted by 5 Eliz. c. 1. f. 21, 22. "That it shall not be lawful to kill any person attainted in *præmunire*, saving such pains of death or other hurt or punishment, as heretofore might, without danger of law, be done upon any person that shall send or bring into the realm, or within the same shall execute, any process, &c. from the see of Rome."

Co. Lit. 130.
12 Co. 68.
3 Inst. 128.
B. Cor. 197.
Jenk. 199.

Stat. 47. But howsoever the law may stand in relation to such persons as are within the exception of this act, it is certain that no person whatsoever attainted of any *præmunire* can bring an action for any injury whatsoever; and that no one knowing him to be guilty can with safety give him aid, comfort or relief.

1 Inst. 130.
1 Elis. 1. c. 39.
Poß. 126.
Staunf. 44.
Plow. 97.
4 Comm. 118.
3 Jac. 333.

Stat. 48. But it hath been resolved, That those general words in the statute 16 Rich. 2. c. 5. That all the lands and tenements shall be forfeited, extend not to land entailed, after the death of the offender.

1 Inst. 130.
3 Inst. 126.
2 Lev. 169.
B. 2. c. 49.
f. 28.
C. Car. 172.
Jones. 217.

Stat. 49. Also it hath been resolved, That a statute, by appointing that an offender shall incur the penalty and danger mentioned in the 16 Rich. 2. c. 5. does not confine the

1 Ven. 173.
For the judgment in *præmunire*, see b. 2. c. 48. l. 9. to 273.

THE following offences also have been made subject to the penalties of a *præmunire*.

1. To molest the possessors of aubey lands, granted by parliament to Henry the Eighth and Edward the Sixth, 1 & 2. Ph. & Ma. c. 8. f. 40.

2. To take more than the rate of 10 l. for the loan of 100 l. for a year, against the injunctions of 5 Ed. 6. c. 20. 13 Eliz. c. 8. Noy. 2. Het. 25. Cro. Jac. 253.

3. To procure any action to be delayed, after notice, otherwise than by the regular process of the court. 21 Jac. 1. c. 3. f. 4.

4. To obstruct the process of making gunpowder, or to prevent the importation of the ingredients of which it is made, by virtue of a pretended authority from the crown. 16 Car. 1. c. 21. 1 Jac. 2. c. 8.

5. To seize the property of another under colour of purveyance, or impress any carriage by way of purveyance. 13 Car. 2. c. 24.

the prosecution for the offence to the particular process thereby given.

6. To assert that both or either house of parliament have legislative authority without the king. 13 Car. 2. c. 1.
7. To send any subject of this realm a prisoner beyond the seas in defiance of the *habeas corpus* act. 31 Car. 2. st. 2.
8. To conspire to avoid the seizure or forfeiture upon the importation of cattle as mentioned in the act. 20 Car. 2. c. 7.
9. To treat of any other matter, at the convention for the election of the sixteen peers of Scotland, save the business of the election. 6 Anne c. 23.
10. To project any scheme by public subscription to the prejudice of great numbers in their trade, and similar to the South-Sea project. 6 Geo. 1. ch. 18. see Str. 472. L. Ray. 1361.
11. To solemnize, assist, or be present at the forbidden marriage of such of the descendants of George the Second, as are prevented by the act, from marrying without the consent of the crown. 12 Geo. 3. c. 11.

CHAPTER THE TWENTIETH.

OF MISPRISION or TREASON.

2 R. 3. 10.
S. P. C. 37.
B. Cor. 174.
Treat. 25. 31.
Skin. 636.
1 Hale 374.
708.
3 Inst. 36.
4 Comm. 119.
Hudson of the court of Star Chamber M S S. in Mus. Brit.

THE word misprision has not any certain signification, but is generally applied to all such high offences as are under the degree of capital, and nearly bordering thereupon; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please.

Offences of this kind are generally said to be twofold. First, Negative, which consist in the omission of something which ought to be done.—Secondly, Positive, which consist in some misdemeanor actually committed.

Sec. 2. The negative misprision more immediately against the king is commonly called misprision of treason, which is an offence consisting in the bare knowledge and concealment of high treason, (whether it be such by 25 Edw. 3. or subsequent statutes) without any degree of assent thereto; and this is declared to be a misprision only by 1 & 2 Mar. c. 10. But at law, any delay in discovering high treason, whatever excuses the party might have for it, was deemed an assent to it, and consequently high treason.

Sec. 3. And at this day, if the concealment of high treason be accompanied with any circumstances which shew an approbation thereof, it amounts to high treason; as if one, having notice before-hand that persons designed to meet in order to conspire against the government, go into their company and hear their treasonable consultation and conceal it; or if one, who has been once accidentally in such com-

Hale 48. 371.
Sum. 127.
Bast. 118.
S. P. C. 37.
3 Inst. 36.

Sum. 127.
Kely 17. 21.
4 Comm. 120.

pany.

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pany and heard such discourse, meet the same company a second time, and hear such like discourse, and conceal it.

Stat. 4. Also whoever receives and comforts a traitor, knowing him to be such, whether by counterfeiting of coin, (a) or otherwise, is himself a principal traitor; for such a receipt of a felon makes the receiver an accessory to the felony, and whatever makes an accessory in felony, makes a principal in treason.

3 H. 7. 10.
Sum. 127.
3 Inst. 138.
12 Co. 81, 82.
Con. Dy. 296.
Inf. B. 2. c. 29.
(a) Qu.
1 Hale 233,
237, 613.
Kely. 22.
Sum. 127.
S. P. C. 37.

Stat. 5. Neither can a person, who has knowledge of a treason, secure himself by discovering that there will be a rising in general, without disclosing the very persons intending to rise; nor even by discovering of these to a private person, who is no magistrate.

Stat. 6. But it seems that one who is only told in general that there will be a rising, without knowing any of the persons or particulars of the design, is not bound to make any discovery at all.

Kely. 22.

Stat. 7. There is one positive misprision which is made misprision of treason, by 13 Eliz. c. 2. by which it is enacted, That those who forge foreign coin, not current here, their aiders, abettors and procurers are guilty of misprision of treason, &c.

1 Hale 376.
4 Com. 121.

CHAPTER THE TWENTY FIRST.

OF CONTEMPTS AGAINST THE KING'S COURTS.

OTHER positive misprisions more immediately against the king seem reducible to the following heads.—First, Contempts against his palace or courts of justice. Secondly, Contempts against his prerogative. Thirdly, Contempts against his person or government. Fourthly, Contempts against his title.

Stat. 1. And first, Contempts against the king's palace, &c. have always been looked upon as very high misprisions, and by the ancient law before the conquest, Fighting in the king's palace was a capital offence; and by 33 Hen. 8. c. 12. s. 7. "Malicious striking in the king's palace, whereby any blood shall be shed, is punishable with the loss of hand, perpetual imprisonment, and fine at the king's pleasure."

3 Hen. 7. c. 14.
9 Ann. c. 16.
Steirn de jure
Goth. 1. 3. c. 3.
L. L. Alured
cap. 7 & 34.
3 Inst. 140.
Pop. 206.

Stat. 2. It seems questionable from the construction of this whole act, and the general tenor of the law-books, whether striking in a palace, wherein the king is not at the

See first part of
the act.
S. P. C. 38.
B. Pain 16.
time Dalt. c. 30.

6 Mod. 75, 76. time actually resident, (1) be within the statute; and it is said
 3 Inst. 140. that the instance which is given in the third Institute, of a
 4 Com. 125. person's hand being cut off for striking in the tower, is not
 warranted by the record.

(1) The 3 Jac. 2. The Earl of Devonshire struck Colonel Culpepper in the *room next to the drawing room* at Whitehall; an information was exhibited in the King's Bench for this misdemeanor; and the Earl alleged his privilege, and refused to plead. On argument, the objection was over-ruled, and the Earl fined 30000*l.* and imprisonment till paid. On error being brought, the house of Lords determined, 1. That it was a contempt of privilege. 2. That the fine was exorbitant and repugnant to Magna Charta. 3. That no peer ought to be imprisoned at any time for the non-payment of a fine to the king. 11 State Trials. 133.

L. L. Ina. c. 6. *SecT. 3.* However it is certain, That by the common law
 L. L. Canuti. c. 56. which continues to this day, striking in Westminster Hall,
 L. L. Alured c. 7. where the king is only present, as represented by his judges,
 2 Inst. 549. and by their administration distributing justice to his people,
 3 Inst. 140. is more penal than any striking in another place in his actual
 S. P. C. 38. presence; for the latter is not punished with the loss of
 Dalt. c. 90. hand, unless some blood be drawn, nor even then with the
 41 Aff. 25. loss of lands or goods: but if a person draw his sword on any
 22 E. 3. 18. judge, in the presence of the court of king's bench, chancery,
 Dyer 188. common pleas, or exchequer, or before the justices of assize,
 See B. 2. c. 48. or oyer and terminer, whether he strike or not; or strike a
 f. 11. juror; or any other person, with or without a weapon, he
 Dalif. 23. shall lose his hand and his goods, and the profits of his
 2 R. Abr. 76. lands during life, and suffer perpetual imprisonment, (a) if the
 Sum. 131. indictment lay the offence as done *coram domino rege*.
 1 Keb. 751. (a) Owen 120.
 12 Co. 71. C. Eliz. 405.

1 Lev. 106. *SecT. 4.* Neither can one who is guilty of such offence
 6 Mod. 172. excuse the same by shewing that the person so struck by him
 Noy 104. gave the first assault.
 C. Jac. 367.

22 E. 3. 13. *SecT. 5.* Also he who rescues a prisoner from any of the
 3 Inst. 141. courts above mentioned, without striking a blow, shall forfeit
 Con. Sum. 131. his goods and the profits of his lands, and suffer imprisonment
 during life, but not lose his hand, because he did not
 strike.

C. Eliz. 405. *SecT. 6.* And he who makes an affray in the palace-yard
 C. Car. 373. near the said courts, but out of their view, shall be impris-
 W. Jon. 345. oned during the king's pleasure, and severely fined, but not
 Owen 120. lose his hand.
 3 Inst. 142.
 Moor 819.

SecT. 7. And not only those who are guilty of such an
 actual violence, but also those who disturb such courts by
 threatening or reproachful words to any judge sitting in
 them, are guilty of a high misprision; and in the time of
 Edward the First, one William de Bruce, who upon hearing
 judgment given against him in the exchequer, said to the
 chief baron, "*Roger, Roger, Thou hast had thy will of me,*
 "*which of a long time thou hast sought, and I will remember*
 "*it,*" was for these words imprisoned during the king's
 pleasure, and ordered to walk from the king's bench to
 the exchequer, bareheaded and ungirt, and to ask forgive-
 ness, &c. And in the time of Charles the First, one Har-
 rison,

rison, for rushing into the court of common pleas, and saying to justice Hutton sitting there, "I do accuse Mr. justice Hutton of high treason," was fined five thousand pounds, and imprisoned during the king's pleasure, and ordered to go to all the courts of Westminster Hall with a paper on his head, shewing his offence, and to make his submission, &c. And these cases are the more remarkable, because in the first, the offender was of a very honourable family; and in the second, a bachelor of divinity, and yet condemned to such corporal punishment, the lowest of which is in judgment of law higher than the greatest fine whatever.

C. Car. 503,
504.
Hutt. 131.
Pop. 135.

Sec. 8. Also all who reflect on the justice or honour of those high courts seem to be indictable and highly finable; as if one charge an exemplification under the great seal to be contrary to the original.

Hob. 220.
Moor 563.
Pop. 135.

Sec. 9. Also he who gives another the lie in Westminster Hall sitting the courts, shall be bound to his good behaviour.

1 Lev. 107.
1 Keb. 558.

Sec. 10. And, he, who makes an affray in the presence of any of the king's inferior courts of justice, is highly finable, but not punishable with loss of hand, &c.

3 Inst. 141.
12 Co. 71.

Sec. 11. And he who speaks contemptuous and reproachful words to the judge of such a court in execution of his office is immediately fineable by such judge, (a) or, as some say, may be (b) indicted, &c. as if one give the lie to a judge of a court-leet in the face of the court, (c) or being (d) admonished by him to pull off his hat, say, "I do not value what you can do," or tell him in the face of the court that he is (e) forsworn, or call him (f) fool, &c. or say, "If I cannot have justice here, I will have it elsewhere." (g)

(a) C. Eliz. 78.
2 R. Abr. 78.
(b) 1 Sid. 144.
con. 2. R.
Abr. 78.
(c) Owen 113.
Moor 470.
C. Eliz. 581.
(d) Raym. 68.
1 Keb. 451, 465.
(e) 2 R. Abr. 78.
(f) C. Eliz. 78.
Moor 247.
(g) 1 Sid. 144.
1 Keb. 508.

Sec. 12. And it was formerly holden that a man might be indicted for a slander of the justice of the nation, by reflecting on a sentence given in any court ecclesiastical or temporal, whether directly, as where one said that such a sentence given by the high commission court, was against law; or obliquely, as where one said that such a sentence was just, but that the testimonies on which it was founded were false, or the affidavits equivocating.

2 R. Abr. 78.
1 Roll. 245.

Sec. 13. But it seems the better opinion of this day, That a man cannot be indicted for any scandalous or contemptuous words spoken of or to such officers, not being in the actual execution of their office; for such an offence seems rather to proceed from ill breeding than a contempt of the government; and though it may be a cause to bind a man to his good behaviour, yet it does not seem to be of such consequence as to be a sufficient ground for a publick prosecution, as for an offence against the common peace, &c.

Hob. 202.
Moor 819.

1 Ven. 10.

And

- And agreeable hereto it hath been resolved, That a man shall not be indicted for saying, "That whenever a burges of such a town puts on his gown, Satan enters into him;" (i)—or, That "the mayor and aldermen of such a town are as great villains as any that rob on the highway;" (k)—or, That, "the justices of peace understand no more of the statutes of excise than this Jug, nor one of twenty of the parliament-men who made them," (l)—or, That, such a justice of peace is a fool, an ass, and a comb, for making such a warrant, and understands no more law than a slickhill," (m)—or, That "he is not fit to be a justice of peace; for that he will do right or wrong, according as his affections lead him," (n)—or That "such an order is a numscul order, and that the justice deserves to be hanged who made it;" (o)—or That, "such a justice of peace is a forsworn wretch, and that he will fling his purse at him;" (p)—or for saying to a mayor of a town, "You Mr. Mayor, I do not care a fart for you;" (q) 6 Mod. 124. Salk. 697. "You Mr. Mayor, are a rogue and a rascal," (q)—or for saying, That, "The justices of peace have nothing to do with the excise." (r)

Sett. 14. And not only those who disturb the administration of justice by direct contempts offered to the king's courts, but also all such as are guilty of any injurious treatment of those persons who are under the more immediate protection of those courts are highly punishable by fine and imprisonment; as if a man assault or threaten his adversary for suing him, or a counsellor or attorney for being employed against him, or a juror for giving a verdict against him, or a gaoler for keeping a prisoner in safe custody.

Sett. 15. Also all who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable, as those who being examined before the privy council concerning their knowledge of a crime, whereof a third person is accused, disclose what passed in such examination, in order to suppress a farther discovery; and also all those who dissuade, or but endeavour to dissuade a witness from giving evidence against a person indicted, &c. or who advise a prisoner to stand mute on his arraignment, &c. And it was anciently holden, that if one of the grand inquest discover to any persons indicted, the evidence against them, he is an accessory to the offence, whether treason or felony; and at this day it is agreed, that he is guilty of a high misprision, punishable by fine and imprisonment.

CHAPTER THE TWENTY SECOND.

OF CONTEMPTS AGAINST THE KING'S PREROGATIVE.

CONTEMPTS against the King's prerogative are of so various a nature, that they cannot well be reduced to any certain heads. However, the principal of them seem to come under the following particulars: First, Refusing to assist the king for the good of the publick. Secondly, Preferring the interests of a foreign prince to that of our own. Thirdly, Disobeying the king's lawful commands or prohibitions.

Sec. 2. First therefore, it is a high offence for any subject to deny the king that assistance for the good of the publick, either in his councils or wars, which by the law he is bound to give him; as for a peer not to (a) come to the parliament at the day of summons, or to (b) depart from thence without the king's licence; or for a (c) privy councillor to refuse to give his advice on an affair of state; or for any (d) private subject to refuse to serve the king in person, if he be able, or to find another, if he be not able, in the defence of the realm, against rebels and foreign invaders; or, as some say, to refuse to serve the king for pay in his wars abroad.

153. 157. Crom. Jur. 83. 84. 3 Inst. 144. Hob. 235. 12 Co. 94. Ante c.

4 Comm. 125, 126.

(a) Moor 778. Nov 102.

(b) S. P. C. 38. F. Cor. 161.

(c) 2 R. Abr. 211.

(d) 2 R. Abr. 165. B. Tenure

44. 73. 1 Ed. 3. c. 5.

18 Ed. 3. c. 7. 25 Ed. 3. c. 8.

4 H. 4. c. 13. 11 H. 7. c. 1.

& 18. C. Car. 11.

18. l. 12.

Sec. 3. Secondly, It is so high an offence to prefer the interest of a foreign prince to that of our own, that it is criminal to do any thing which may but incline a man so to do; as to receive a pension from a foreign prince without the leave of our king.

Vide ante. Ch. 18. l. 10.

Sec. 4. Thirdly, It is also a high crime to disobey the king's lawful commands or prohibitions; as by obstinately refusing obedience to his writs; or contemning a summons from his council to appear before them; or not answering such questions in relation to a matter wherein the interest of the state is concerned, as shall be proposed by the privy council; or refusing to give evidence to a grand jury concerning a crime (for which (e) the court may impose an immediate fine); or not returning from beyond sea upon the king's letters to that purpose; for which the offender's lands shall be seized till he return, (and when he does return he shall be fined) or assembling at a tournament against the king's express prohibition; or going beyond sea against the king's will ex-

(e) Salk. 278. Dyer 176. 128.

Moor 109. 779. Lane 43.

3 Inst. 179. Sav. 7. 8.

2 R. Abr. 208. F. N. B. 85.

1 Cha. Ca. 116. 3 Inst. 178.

4 Comm. 122. 1 Comm. 266.

pressly

preſſly ſignified, either by the writ, *ne exeat regnum*, (which may be directed as well to a layman as to a clergyman, and on the ſuggeſtion of a private as well as of a publick matter) or under the great or privy ſeal or ſignet, or by proclamation.

C. Eliz. 655.
B. 2. c. 26. ſ.
2.

ſect. 5. Alſo every contempt of a ſtatute is indictable, if no other puniſhment be limited.

TO the foregoing contempts againſt the king's prerogative may be added neglecting to join the *poſſe comitatus*, or power of the county, being thereunto required by the ſheriff or juſtices according to the ſtatute, 2 Hen. 5. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. 4 Comm. 124. Lamb. Eir. 315.

CHAPTER THE TWENTY THIRD.

OF CONTEMPTS AGAINST THE KING'S PERSON OR GOVERNMENT.

4 Comm. 123.

ALL contempts againſt the king's perſon or government are very highly criminal, and puniſhable with fine and imprisonment, and ſometimes with the pillory, by the diſcretion of the judges, upon conſideration of all the circumſtances of the caſe. But inasmuch as it is generally obvious to common ſenſe, in what caſes and to what degree a man is guilty of this offence, and it would be endleſs to enumerate all the particulars, I ſhall content myſelf with glancing at ſome of the moſt general heads; as,

C. Car. 168.
2 Keb. 336.

ſect. 1. The charging the government with oppreſſion or weak adminiſtration; as by ſaying, That "merchants are ſcrewed up here in England more than in Turkey;" or, That "it is a good world when beggarly prieſts are made lords, &c."

3 Mod. 52.
3 Mod. 363.

ſect. 2. The doing an act which impliedly encourages rebellion; as by abſolving perſons at the gallows, who being condemned for high treaſon, ſhew no ſign of repentance, but perſiſt in juſtifying the fact; or by drinking to the pious memory of a perſon executed for high treaſon.

C. Jac. 37.
Moor 756.
Noy 101.

ſect. 3. Endeavouring to frighten the king into a change of his meaſures with threats of the uneaſineſs of his ſubjects; as by ſubſcribing a petition to him, in which it is intimated, that if it be denied, many thouſands will be diſcontented, &c.

C. Jac. 38.
Vide the caſe of Alexander Scott, for publiſhing falſe news. O. B. June ſeſſions, 1778. No. 504.

ſect. 4. Spreading falſe rumours concerning the king's intentions; as that he deſigns to grant a toleration to papists, &c.

Noy 105.

ſect. 5. Charging him with a breach of his coronation oath.

ſect. 6.

Sec. 6. Speaking contemptuously of him; as by cursing him, &c. or giving out that he wants wisdom, valour or steadiness; or in general, doing any thing which may lessen him in the esteem of his subjects, and weaken his government, or raise jealousies between him and his people.

C. Car. 117, &c.

Sec. 7. Also it is said to be an offence, for which a man may be indicted, to refuse in a foreign port to pay the usual customs, because it may cause a breach between our king and the king of the country.

1 Sid. 143.
For other contempts against the King's Person and Government.
Vide Skin. 633.
1 Black. 37.

CHAPTER THE TWENTY FOURTH.

OF CONTEMPTS AGAINST THE KING'S TITLE.

CONTEMPTS against the king's title are of two kinds,—First, Denying his title.—Secondly, Refusing to take the oaths required by law for the support of his government.

Sec. 1. The first offence of this kind, viz. That of denying the king's title, hath by some been carried so high as to be adjudged an overt act of compassing his death. However, it is certainly most highly criminal, and punishable with fine and imprisonment, and also such infamous corporal punishment, as to the discretion of the court shall seem proper, according to the heinousness of the crime and the circumstances of the parties. As if a man in writing or discourse shall maintain that the king is an usurper; or that another hath a better title to the crown, &c. For such like insinuations manifestly tend to raise tumults and disorders in the state, and to alienate the affections of the people from the prince, and incline them to favour the pretensions of another; and it is highly presumptuous for private persons to intermeddle with matters of so high a nature; and it will be impossible to preserve the peace of a government, unless subjects will quietly submit themselves to those whom Providence had placed over them, and prefer the publick good to their own private inclinations and opinions. For otherwise, whenever the title to the crown shall happen to be contested, it will be impossible to end the difference without perpetual civil broils and dissensions, and the prince who prevails will be tempted to esteem those of the contrary party rather as enemies than subjects, if he finds them ready and desirous to lay hold of all opportunities to disturb his government, and shake off their forced obedience. And since there is no tribunal

Yelv. 107. 197.
2 Roll. 90.
Palm. 424.
4 Comm. 123, 124.

but

but that of heaven, to which princes can appeal for the decision of their titles, when that seems so far to have declared in favour of one as to give him quiet possession of the throne, the publick peace, which is the end of all government, requires a dutiful submission to him; and it is the highest madness to give up that ease and security which we may enjoy from a peaceful obedience, in exchange for that disorder, uncertainty, and bloodshed, which cannot but be expected from an attempt to wrest the sceptre out of the hands of our prince; and it is the highest ingratitude to make no other return but disloyalty and rebellion, for all the happiness we can enjoy under a just administration; and it is the greatest of absurdities to think that the good of the community, for the sake of which all government was instituted, ought not to be preferred before the disputed title of a particular person or family. All we can desire from government, is the secure enjoyment of what we may call our own, and whether this or that competitor to the crown be the instrument of this happiness to us, seems little to concern us. Let the title of one out of possession of the throne be never so plausible, it must have its original foundation from some positive law; which, when it cannot take effect without involving a nation in discord and confusion, the avoiding whereof is the very end of all laws, it must give way to the publick necessity of the state; for there can be no human institution whatsoever, but must be limited by this implicit reserve from the first principles of reason, that wherever the execution of it shall be absolutely inconsistent with the happiness of the people for whose sake it was ordained, it ought so far to be suspended.

4 Comm. 123.

Self. 2. For this and many other such like reasons, the law has always had a most tender regard for the security of the prince in possession of the crown, and as it has made it high treason to compass his death, &c. as appears from chapter 17. section 11, &c. so hath it also made it highly penal in any inferior degree to disturb or disquiet his government.

As to the second kind of offences of this nature, *viz.* That of refusing to take the oaths required by law for the support of the king's government; I shall consider,—First, The offence of refusing the oaths required for this purpose by the common law.—Secondly, The offence of refusing the oaths required by statute.

Finch 241,
242.
2 Inst. 73.
1 Hale 64. 71.
3 Keb. 314.

Self. 3. As to the first particular, it seems to be a high contempt at the common law to refuse to take the oath of allegiance to the king, which all laymen above the age of twelve years are bound to take at the torn or court-leet, &c. and surely nothing can be more unreasonable than to deny the

the king, whose government we are happy under, all proper assurances of our fidelity to him; for how can we expect to enjoy the privileges of subjects from one to whom we refuse to acknowledge ourselves subjects, or hope for protection from one, whom we provoke to esteem us as his enemies, or blame that government for treating us as malecontents, to which we give so just a cause to suspect our fidelity? If we consult the law of God, that will tell us, That "the powers that be are ordained of God." If we will hear the voice of reason, that will convince us, that not only the peace and safety of the community, but also our own preservation, requires us to pay a dutiful obedience to those who govern us; and can we think it unlawful to engage ourselves to do what it is our duty to do? If we will consult the practice of all nations, that will shew us, that even conquest, which is the weakest of all titles, has always been esteemed to give the conqueror such a right to the obedience of the conquered, that upon his taking them into his protection, they have in all ages been ready to promise a reciprocal obedience. And if we will consult our own laws, we shall find them to direct us to pay our allegiance to the king who governs us, as has been fully proved in the chapter of high treason.

1 Comm. 367.

4 Comm. 270.

423.

As to the second kind of offences of this nature, *viz.* That of refusing the oaths required *by statute* for the support of the government, I shall consider,—First, The offence of refusing the oaths of allegiance and supremacy.—Secondly, The offence of refusing the oath of abjuration.

Sec. 4. As to the first of these offences, *viz.* That of refusing the oaths of allegiance and supremacy, which since the reformation of religion have been thought necessary to be required from all persons, especially from those who are intrusted with an office, in order to secure our princes from the intrigues of popes, who have often taken upon them to dispense with oaths of allegiance made to such princes whom they are pleased to call hereticks, and to persuade the people that they may lawfully depose those who have so far incurred the displeasure of the bishop of Rome, as to be excommunicated by him, it having been shewn already in chapter 8. under what penalties officers are bound to take the said oaths, and in chapter 19. sect. 27, &c. how far all persons whatsoever are compellable to take them under pain of incurring a *præmunire*, I shall only take notice in this place, of the method of proceeding on 1 Will. & Mar. c. 8. by which it is enacted, "That persons refusing the said oaths, being tendered to them by persons lawfully authorized to tender the same, shall be committed by the persons making such a tender for three months, unless they shall pay such sum, not exceeding 40 s. as the persons, who shall make such tender, shall require of them, and if they refuse again at the

1 Comm. 368.

2 Inst. 121.

1 Hale. 64.

4 Comm. 115.

“ the end of the three months, that they shall be imprisoned
 “ six months, or pay a sum not above ten or under five
 “ pounds, and also find sureties for their good behaviour
 “ and appearance at the next assizes, where if they refuse the
 “ said oaths, they shall be incapable of any office, and con-
 “ tinue bound to their good behaviour, and if they refuse
 “ the declaration mentioned in 30 Car. 2. they shall suffer
 “ as popish recusants convict.”

Self. 5. It seems to be the intention of this statute, to give the government an election to proceed either on the mild method therein prescribed, or the more severe one appointed by the former laws, according to the circumstances of the case, and quality of the offender, &c.

2 Comm. 368.

Self. 6. As to the second offence of this kind, viz. That of refusing the oath of abjuration, the same depends on those laws, which the nation has been of late under a necessity of establishing, by adding a new limitation to the law relating to the succession of the crown, excluding all Papists from a possibility of inheriting it; who, if they be true to their engagements to their own religion, cannot but be false to those they may make to ours, and can never be expected to execute those laws, which they cannot but think void, as being repugnant to the laws of God; or to defend that faith which they think damnable; or to observe those oaths, which seem to them to have been ordained for the support of irreligion. And from these considerations they have been disabled from inheriting the crown, it seeming of absolute necessity in our present circumstances for the good of the community, to make such an alteration in law, which like all other human laws depending merely on the policy of men, seems to have nothing in it so sacred as to oblige the people unalterably to abide by it to the hazard of their common safety, peace and happiness, for the sake whereof it was at first ordained. For surely, there cannot be so much danger to the common good from such an alteration, as must needs follow from the government of a prince, whose conscience is under the influence of those, who are implacable enemies to the religion of his country, and who thinks himself bound by his duty to God and his church to promote that interest, which his people think themselves under the like obligations to oppose. From which unhappy circumstances nothing can be expected but endless factions, discords, irreconcilable jealousies and distrusts between prince and people, which, if they break not into an open rupture, will at least be attended with such convulsions and uneasinesses, as render a state of government scarce one degree more secure than a state of anarchy and confusion.

Self.

Stat. 7. For the remedying of such like inconveniences, 1 Comm. 362. it having been thought proper to exclude all papists from the crown, it was likewise thought expedient to secure the present settlement, by obliging all officers, &c. to take the oath of abjuration. As to which it is enacted by 13 Will. 3. c. 6. & 1 Geo. 1. st. 2. c. 13. "That all persons who shall be admitted, &c. into any office civil or military, (not being an office of inheritance, executed by a lawful deputy) or shall receive any pay, salary, fee or wages, by reason of any patent or grant from the king, or that have a command or place of trust under the king, &c. or shall be admitted into any service or employment in the king's household or family, or of his royal highness George prince of Wales, or her royal highness the princess of Wales, or their issue, and all ecclesiastical persons, heads or governors, of what denomination soever, and all other members of colleges and halls in any university, that shall be of the foundation, or enjoy any exhibition, being of, or as soon as they shall attain the age of eighteen years, and all persons teaching or reading to pupils in any university or elsewhere, and all school-masters and ushers, and all preachers and teachers of separate congregations, high or chief constables, and every person who shall act as serjeant at law, counsellor at law, barrister, advocate, attorney, solicitor, proctor, clerk, or notary, by practising in any manner as such, in any court or courts whatsoever within that part of Great Britain called England, shall, within three months (a) after they shall be admitted into or enter upon any such preferment, benefice, office, or place, or come into such capacity, or take upon them such practice, employment, or business, take and subscribe the oaths of allegiance, supremacy and abjuration, (b) at one of the courts at Westminster, or at the general quarter-sessions of the peace where they shall reside; or otherwise they shall be *ipso facto* adjudged incapable, and disabled in law, to have, occupy, or enjoy the said offices, &c. and if they shall by themselves, or deputy or trustee, execute any the said offices, &c. and shall be thereof convicted, &c. they shall be disabled to prosecute any suit at law or equity, or to be guardians, executors, or administrators, or capable of any legacy or deed of gift, or to be in any office within this realm, or to vote at any election for members of parliament, and shall forfeit five hundred pounds, &c."

he altered the form of the oath of abjuration so as to renounce the descendants of the said James. But no provision is made for altering in like manner the Quakers form of affirmation.

Stat. 8. And it is farther enacted by the said statute, "That any two justices of the peace, or any other person or persons who shall be by the king for that purpose specially appointed, by order in the privy council or by commission under the great seal, may administer and tender the said oaths to any Vol. I. H person Vide 22 Co. 131.

(a) By 2. Geo. 2. c. 31.

9 Geo. 2. c. 26.

16 Geo. 2. c. 30.

the time is enlarged to six months and other regulations enacted.

(b) After the death of the late pretender who assumed the title of king of England by the name of James the Third, it became absurd to renounce a person being dead, therefore the

6 Geo. 3. c. 53.

(r) It seems that a bare suspicion is not sufficient, but there must be some good

cause of suspicion, and that the cause of suspicion is traversable.

3 Burn. 249.

(s) A person cannot be said to refuse the oath unless they be read to him

or offered to be read. 3 Burn. 249. But see 5 Mod. 316. Salk. 428. Jones 121.

“ person whatsoever, whom they shall suspect (a) to be dangerous or disaffected; and that if any person, to whom the said oaths shall be so tendered, shall neglect or refuse (b) to take the same; or if any person, being summoned by the said justices, &c. in order to take the said oaths, either in proper person, or by notice left at his place of abode with one of the family, shall neglect or refuse to appear, &c. such refusal shall be certified at sessions, &c. and from thence to the king’s bench or chancery, &c. and every such person so neglecting to take the said oaths, shall be adjudged a popish recusant convict, &c.”

Stat. 9. And it is farther enacted by the said statute, “ That if any member of either university shall neglect to take and subscribe the said oaths according to the intent of the said act, or to produce a certificate thereof, under the hand of some proper officer of the respective court, and cause the same to be entered in the register of the proper college or hall, within one month after his having taken and subscribed the said oaths; and if the persons in whom the right of election of such member shall be, do neglect to elect some fitting person in his stead within twelve months, &c. that then the king may, under the great seal or sign manual, nominate some fitting person, qualified according to the local statutes of such college, &c. and if the head of any college, &c. shall neglect to admit such nominee, by the space of ten days after such admission shall be demanded of him, that then the local visitor shall admit the said nominee; and if such visitor shall neglect or refuse to admit such person within the space of one month after the same shall be demanded, that then the court of king’s bench may issue a writ of mandamus to such visitor to admit such nominee, &c.”

Stat. 10. And it is farther enacted by the said statute, “ That no peer shall vote or make his proxy, or sit in the house of peers during any debate, and that no member of the house of commons shall vote or sit during any debate in the said house after the speaker is chosen, until he shall have taken the said oaths, &c. under pain of the disabilities and forfeitures above mentioned, &c.”

SOMEWHAT similar to the oaths required by the corporation and test acts, and the acts above mentioned, are the ceremonies and oaths required previous to being naturalized. 4 Comm. 58. *For which, see 1 Jac. 1. c. 2. 7 Ann. c. 5. 10 Ann. c. 5. 4 Geo. 2. c. 21. 20 Geo. 2. c. 44. For the declaration against popery, vide 30 Car. 2. st. 2. c. 1.—For the oaths to be taken by peers of Scotland, and by city councillors, vide 6 Ann. c. 23. 1 Geo. 1. c. 4.—For the Moravian affirmation, 23 Geo. 2. c. 30. Quakers’ profession of belief, 1 Will. 3. c. 18. Quakers’ affirmation, 8 Geo. 3. c. 6. and for the oaths in which it is allowed to be taken, 5 Mod. 403. Str. 441, 527, 856, 872, 1219.*

CHAPTER THE TWENTY-FIFTH.

OF FELONY.

OFFENCES more immediately against the subject are either capital or not capital.—The capital are either by the common law, or by statute.

SECT. 1. Those by the common law come generally under the title of felony, which, *ex vi termini*, signifies, *quodlibet crimen felleo animo perpetratum*, and can be expressed by no periphrasis, or word equivalent, without the word *felonice*. Vide Spelm.
Gloss. verb.
Feloniam 214.
Co. Lit. 391.

SECT. 2. Felony is said to be included in high treason, and consequently a pardon of felony discharges an indictment of high treason, if it want the word *proditorie*. Sum. 11. 3 H.
7, 10. 3 Inst.
15. 4 Comm.
94, 97.

SECT. 3. It is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion, as where persons break open a door, in order to execute a warrant, which will not justify such a proceeding; *affectio enim tua nomen imponit operi tuo; item crimen non contrahitur nisi nocendi voluntas intercedat*. But the bare intention to commit a felony is so very criminal, that at the common law it was punishable as felony, where it missed its effect through some accident no way lessening the guilt of the offender. But it seems agreed at this day, That felony shall not be imputed to a bare intention to commit it, yet it is certain that the party may be very severely fined for such an intention. Bract. 1. c. 4.
S. P. C. 17. 27.
1 Lev. 146.
1 Sid. 230, 231.
Kely. 24. Sum.
61.
5 Mod. 206.

FELONY in the general acceptance of our English law, comprizes every species of crime which occasioned at common law the forfeiture of land or goods. This most frequently happens in those crimes for which a capital punishment either is, or was liable to be inflicted. All offences therefore now capital are in some degree or other felony: and this is likewise the case with some other offences which are not punished with death; as suicide, where the party is already dead; homicide, by chance medley or in self-defence; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. The definition of felony, therefore, seems to be, "an offence which occasions a total forfeiture of either lands or goods, or both at the common law; and to which capital or other punishment *may be* superadded according to the degree of guilt." But felony may be without inflicting capital punishment, as in the case instanced of self murder, excusable homicide and petit larceny; and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in the case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods; (3 Inst. 43.) an inseparable incident to felony. And of the same nature is the punishment of standing mute, without pleading to an indictment; which is capital but without any forfeiture, and therefore such standing mute is no felony. In short the true criterion of felony is forfeiture. The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. Therefore if a statute makes a new offence felony, the law implies that it shall be punished with death, as well as with forfeiture, unless the offender prays the benefit of clergy, which all felons are entitled once to have, unless the same is expressly taken away by statute. 4 Comm. 94 to 99.

CHAPTER THE TWENTY-SIXTH.

OF CASUAL DEATH AND OF DEODANDS.

OF capital offences at common law more immediately against the subject, there are three principal kinds: First, Such as are committed against his life. Secondly, Such as are against his goods. Thirdly, Such as are against his habitation.

Book 2d. c. 17. *SECT. 1.* There is another mix'd kind of capital offences, which consists in the hindrance of the due process of public justice, which I shall consider in the second book, wherein I shall treat of the means of bringing offenders to their due punishment.

Bract. l. 3. c. 4. *SECT. 2.* Offences against the life of a man come under the general name of homicide, which in our law signifies the killing of a man by a man.

1 Hale 471, 472. *SECT. 3.* But before I treat hereof, it may not be improper to consider the killing of a man merely *per infortunium*, occasioned by some animal or thing without life, without the default or procurement of another man, as where one is killed by a fall from a horse or cart, &c. which, though it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder, and the unhappy instrument or occasion of such death is called a deodand, and forfeited to the king, in order to be disposed of in pious uses by the king's almoner; as also are all such weapons whereby one man kills another.

Pult. 125.
4 Co. 110.
3 Inst. 57, 58.
Crim. 31.
1 Hale 34. 419.
S. P. C. 21.
3 Inst. 58.
Sum. 34.
Pult. 125.
Dalt. c. 97.
2 Keb. 719,
206.
SECT. 4. It seems clearly settled, that a horse, &c. killing an infant within the age of discretion, are as much forfeited as if he were of age: But formerly it was holden, That a horse or cart, by a fall from which an infant was slain, were not forfeited, perhaps for this reason (1), because the misfortune might rather seem owing to the indiscretion of the infant than any default in the horse, &c. But this distinction has not been allowed of late; for the law does not ground the forfeiture on any default in the things forfeited, since it extends it to things without life, to which 'tis plain, that no manner of fault can be imputed.

(1) The forfeiture of deodands originated in the blind days of popery and superstition. They were designed to purchase, by propitiatory masses, an expiation for the souls of such as were snatched away by untimely death. But the presumed innocence of childhood rendered such atonement unnecessary. Therefore no deodand is due, where an infant under the age of discretion is killed by a fall from any thing that is not in motion, 1 Comm. 300. But if the instrument move to the death, either of an infant, or an adult, it is forfeited, or an inquisition found as a deodand. 3 Inst. 57. 1 Hale 422.

Sett. 5. Also by the opinion of our ancient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a steeple, &c. may be deodands, but by the latter resolutions they cannot, unless they were severed before the accident happened.

S. P. C. 20.
Pult. 124.
1 Sid. 206, 207.
1 Lev. 136.
Raym. 97.
6 Mod. 197.
1 Keb. 723.
745. Str. 61. Co. Lit. 53.283.

Sett. 6. However, as it is agreed by all, a ship in salt water, whether in the open sea or within the body of a county, from which a man falls and is drowned, is not forfeited, because persons at sea are continually exposed to so many perils, that the law imputes such misfortunes happening there, rather to them than to the ship. Also it seems clear, that when a man riding on a horse over a river is drowned through the violence of the stream, the horse is not forfeited, because not that, but the waters caused his death (2): But it is said, that a ship by a fall from which a man is drowned in the fresh water shall be forfeited, but not the merchandize therein, because they no way contribute to his death. And by the same reason it seems, that if a man riding on the shafts of a waggon fall to the ground and break his neck, the horses and waggon only are forfeited, and not the loading, because it no way contributed to his death; for which cause, where a thing not in motion causes a man's death, that part thereof only which is the immediate cause is forfeited. As where one climbing upon the wheel of a cart while it stands still, falls from it and dies of the fall, the wheel only is forfeited: but if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater; and it is a general rule, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also, for the rule is, *Omnia quæque movent ad mortem, sunt deodanda*.

S. P. C. 20, 21.
Pult. 124, 125.
3 Inst. 58.
Summary 33.
1 Hale 422.
Salk. 220.
C. Jac. 483.
2 Roll. 23.
Popham 136.
(2) Quere if it had appeared, that the horse had thrown him.

Sayer 249.
F. Cor. 341.

Bracl. l. 3. c. 5.

Sett. 7. In all these cases, if the party wounded die not of his wound within a year and a day after he received it, there shall be nothing forfeited, for the law does not look on such a wound as the cause of a man's death, after which he lives so long: But if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the mean time.

Sum. 55.
S. P. C. 21.

Dalt. c. 97.
Plewd. 260.
Keilw. 68.

Sett. 8. However, nothing can be forfeited as a deodand, nor seized as such, till it be found by the coroner's inquest to have caused a man's death; but after such inquisition, the sheriff is answerable for the value of it, and may levy the same

Co. 110.
Co. Lit. 115.
Dalt. c. 97.
S. P. C. 21.
Pult. 125.
See 4 Ed. 1.
1 Hale 418, 419.

de Offic. Coronatoris.

on the town where it fell, and therefore the inquest ought to find the value of it. (3)

(3) Upon inquisitions of this kind the jury generally find the value of the deodand to be as small as possible, and even confine that value, according to the circumstances of the case, to the very thing or part of the thing itself which caused the death, 2 Bac. Abr. 26. This practice the court of king's bench have impliedly sanctioned, by refusing to reform it on an application in favour of the crown or its grantee, Fost. 206. 2 Bar. K. B. 82. Nor can such an inquisition be taken by the grand jury on default of the coroner. 1 Burr. 19 (and when taken by the coroner, it may be moved and traversed, 1 Burr. 20. 2 Hale 416.) because it is transacted in secret, taken *ex parte*, and intended as the platform of an odious superstitious claim, 4 Inst. 196. repugnant to the principles of sound reason and true policy. Foster 266.

CHAPTER THE TWENTY-SEVENTH.

OF FELO DE SE.

HOMICIDE properly so called, is either against a man's own life, or that of another.—In treating of homicide against a man's own life, I shall consider: First, in what cases a man shall be said to be a *felo de se*. Secondly, what he shall forfeit for this offence.

1 Hale 411.
Crem. 10, 31.
Sum. 28.
Dalt. c. 92.
3 Inst. 54.

Sect. 1. As to the first point, I shall take it for granted, That in this as well as in all other felonies, the offender ought to be of the age of discretion, and *compos mentis*; and therefore, that an infant killing himself under the age of discretion, or a lunatick during his lunacy, cannot be a *felo de se*.

3 Med. 100.

Sect. 2. But here I cannot but take notice of a strange notion, which has unaccountably prevailed of late, That every one who kills himself, must be *non compos* of course; for it is said to be impossible, that a man in his senses should do a thing so contrary to nature and all sense and reason.

Plow. 261.
Comb. 2, 3.

Sect. 3. If this argument be good, self-murder can be no crime, for a madman can be guilty of none: But it is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not with as much reason be argued, that the murder of a child or of a parent is against nature and reason, and consequently that no man in his senses can commit it? But has a man therefore no use of his reason, because he acts against right reason? Why may not the passions of grief and discontent tempt a man knowingly to act against the principles of nature and reason in this case, as those of love, hatred and revenge, and such like, are too well known to do in others?

Sect. 4. However our laws have always had such an abhorrence of this crime, that not only he who kills himself with

a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such attempt unwillingly kills himself, shall be adjudged in the eye of the law a *felo de se*. For wherever death is caused by an act done with a murderous intent, it makes the offender a murderer; and therefore if A. discharge a gun at B. with an intent to kill him, and the gun breaks and kills A. or if A. strike B. to the ground, and then hastily falling upon him wound himself with a knife which B. happens to have in his hand and die, in both these cases A. is *felo de se*, for he is the only agent.

Dart. c. 124.
44 Aff. 5c.
B. Cor. 12, 14.
3 Inst. p. 54.

Sect. 5. But if B. being so assaulted had been driven to the wall, and holden up a pitch-fork or knife, standing in his defence, and A. had hastily run upon the same and been slain, B. should be adjudged to kill him in his own defence. And for the same reason perhaps in the case above, if B. after he had fallen to the ground, had holden up a knife or sword in his defence, and A. had fallen thereon and been slain, B. should be adjudged to kill him *se defendendo*; for here B. exerts his strength in his own defence, and by so doing occasions the mortal wound received by A.

Staun. 16.
Sim. 28, 29.
Pult. 119.
Crom. 28.
3 Inst. 54.
Vide 1 Hale 413.
& 493. upon this case; which he contends is misrepresented both by Dalton and Coke, and that it was adjudged homicide per infortunium.

Sect. 6. He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head, and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, as being against the laws of God and man: But where two persons agree to die together, and one of them at the persuasion of the other buys ratbane, and mixes it in a potion, and both drink of it, and he who bought and made the potion, survives by using proper remedies, and the other dies, perhaps it is the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.

Keilw. 136.

Moor 754.

Sect. 7. As to the second point, viz. What such an offender shall forfeit, it seems clear that he shall forfeit all chattels, real or personal, which he hath in his own right, and also all such chattels real whereof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action belonging solely to himself; and also all personal things in action, and as some say, entire chattels in possession, to which he was entitled jointly with another, on any account except that of merchandize; but it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator.

S. P. C. 188,
189. 262, 263.
1 Hale 413.
Finch. 216.
Sum. 29.
Crom. 31.
3 Inst. 55.
19 H. 6. 47.
8 B. 4. 24.
Raym. 7.
Plow. 243, 259.
262, 323.
4 Comm. 190.
193.

Sect. 8. However the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower.

1 Hale 413.
Plow. 261, 262.

Sec. 9. Also no part of the personal estate is vested in the king, before the self-murder is found by some inquisition; and consequently the forfeiture thereof is saved by a pardon of the offence before such finding.

5 Co. 110.
3 Inst. 54.
1 Saund. 362.
1 Hale 414.
1 Sid. 150, 162.
2 Mod. 53.
3 Mod. 100. 241, 242. Con. 1. Lev. 8. 1 Keb. 67, 68. 4 Comm. 190.

Sec. 10. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time such mortal wound was given, and all intermediate alienations are avoided.

Plow. 260.
Sum. 29.
5 Co. 110.
1 Hale 412.
4 Com. 190.

Sec. 11. And such inquisitions ought to be by the coroner *super visum corporis*, if the body can be found; and an inquisition so taken, as some say, cannot be traversed.

Sum. 29.
3 Inst. 55.
47 Ed. 3. 76.
See B. 2. c. 9.
f. 52. 1 Hale
414 to 417. Far. 16. Salk. 190, 377. Carth. 72. Skin. 45. Stamf. 183. 3 Mod. 80, 238.
1 Mod. 82. 2 Keb. 859. 1 Vent. 181, 182. 2 Vent. 38. 2 Jones 198. 2 Hale 59. Lev. 8. Sid. 150.

Sec. 12. But if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by justices of peace, who by their commission have a general power to inquire of all felonies; or in the king's bench, if the felony were committed in the county where the said court sits; and such inquisitions are traversable by the executor, &c.

3 Inst. 55.
Sum. 29.
2 Lev. 141.
1 Hale 414.
Carth. 73.
1 Burr. 18.
1 Freem. 430.
1 Roll. 217.
1 Sid. 101, 144.

Sec. 13. Also all inquisitions of this offence being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact; as the particular manner of the wound, and that it was mortal, &c. and in the conclusion add, that the party in such manner murdered himself.

Salk. 377.
7 Mod. 16.
8 Mod. 82.

Sec. 14. Therefore if either the premisses be insufficient, as if it be found that the party flung himself into the water, & *sic seipsum emergit*, which is nonsense, because *emerge* signifies only to rise out of the water: or if there be wanting the proper conclusion, & *sic seipsum murdravit*, the inquisition is not good.

2 Lev. 140, 152.
3 Mod. 100.
12 Mod. 112.
Vide Salk. 377.

Sec. 15. Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form.

1 Sid. 225, 259.
3 Mod. 101.
1 Keb. 907.
Fitzg. 6. See 1 Saund. 273. for process from the Crown-Office on such an inquisition against a debtor of a *felo de se*.

CHAPTER THE TWENTY-EIGHTH.

OF JUSTIFIABLE HOMICIDE.

HOMICIDE against the life of another either amounts to felony, or does not. That which amounts not to felony is either justifiable, and causes no forfeiture at all, or excusable, and causes the forfeiture of the party's goods.

And

And first of justifiable homicide ; concerning which I shall premise these general rules.

Sec. 1. First, It must be owing to some unavoidable necessity, to which the person who kills another must be reduced without any manner of fault in himself. Vid. sect. 22.

Sec. 2. Secondly, There must be no malice coloured under pretence of necessity ; for wherever a person who kills another, acts in truth upon malice, and takes occasion, from the appearance of necessity, to execute his own private revenge, he is guilty of murder. 2 Roll. 120.
Kely. 28.
Sum. 38.
Bract. l. 3. c. 4.
21 Edw. 1. de
Mal. in Parciis.

Sec. 3. Thirdly, According to the opinion of the old books (*a*), which in this respect seem to be contradicted by others more modern (*b*), it seems, that one may set forth a fact, amounting to justifiable homicide, in a special plea to an indictment or appeal of murder ; and that the same being found true, he shall be dismissed, without being arraigned, or enforced to plead Not guilty. And indeed it seems extremely hard, that a sheriff or judge who condemn or execute a criminal, &c. should be forced, on a frivolous prosecution, to hold up their hands at the bar for it, &c. But it is agreed, that no one can plead a fact amounting to homicide *se defendendo*, or by misadventure, but that in such a case the defendant must plead Not guilty, and give the special matter in evidence : And it is also agreed, that where a special fact, amounting to justifiable homicide, is found by the jury, the party is to be dismissed, without being obliged to purchase any pardon, &c. (a) 22 Aff. 55.
27 Aff. 41.
37 H. 6. 20, 21.
Dalt. 150.
B. App. 5, 129.
B. Cor. 57, 87,
89.
(b) 35 H. 6.
11. 58.
B. App. 122.
2 Inst. 316.
Co. Lit. 283.
Sum. 38.
1 Hale 478.

Justifiable homicide is either of a public or private nature. That of a public nature, is such as is occasioned by the due execution or advancement of public justice.—That of a private nature is such as happens in the just defence of a man's person, house, or goods.

And first, I shall consider justifiable homicide in the due execution of public justice. As to which the following rules must be observed.

Sec. 4. First, The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the cause ; for otherwise both judge and officer may be guilty of felony. Dalt. c. 9.
1 Hale 497.
10 Co. 76.
22 E. 4. 33.
Sum. 35.

Sec. 5. And therefore, if the court of common pleas give judgment on an appeal of death, or justices of peace on an indictment of treason, and award execution, which is executed, both the judges who give, and the officers who execute the sentence, are guilty of felony, because these courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void, and without any foundation. 4 Comm. 178.
1 Hale 497. 500.
3 Inst. 43.
5 Rep. 106.
Cro. Car. 98.
Moor. 313.

Sum. 35.
Dalt. c. 98.
1 Hale 501.

Sec. 6. But if the justices of peace, on an indictment of trespass, arraign a man of felony, and condemn him, and he be executed, the justices only are guilty of felony, and not the officers who execute their sentence; for the justices had a jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void.

Co. Lit. 128.
2 Aff. 3.
S. P. C. 13. 196.
1 Hale 497.
11 H. 4. 12.
Plow. 306.
3 Inst. 131.

Sec. 7. Secondly, The judgment must be executed by the lawful officer.

Sec. 8. Indeed it was formerly holden, that any one might as lawfully kill a person attainted of treason or felony, as a wolf or other wild beast; and anciently a person condemned in an appeal of death, was delivered to the relations of the deceased, in order to be executed by them.

27 Aff. 41.
1 Hale 501.
B. App. 69.
Cor. 67. 197.
Co. Lit. 128.
Dalt. c. 98.
Sum. 35.

Sec. 9. But at this day, as it seems agreed, if the judge, who gives the sentence of death, and, *a fortiori*, if any private person execute the same, or if the proper officer himself do it without a lawful command, they are guilty of felony.

35 H. 6. 58.
1 Hale 454, 501.
B. App. 5.
S. P. C. 13.
Sum. 36, 272.
See B. 2. c. 51.
Finch. 31. 3 Inst. 52. 211. 2 Hale 411. 4 St. Tr. 129. Foster 268.

Sec. 10. Thirdly, The execution must be pursuant of, and warranted by the judgment, otherwise it is without authority; and consequently if a sheriff behead a man where it is no part of the sentence to cut off the head, he is guilty of felony (1).

(1) That is, if the officer varieth from the judgment, of his own head and without warrant or the colour of authority, but not if he is authorized by custom or by warrant from the crown. For although the king cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law; yet it doth not follow that he, who may remit part of the judgment or wholly pardon the offender cannot mitigate his punishment with regard to the pain or infamy of it. Foster 267.

AND now we are come to justifiable homicide in the due advancement of public justice, which I shall consider,—First, in relation to criminal,—Secondly, in relation to civil causes.

22 Aff. 55.
B. Cor. 87, 89.
S. P. C. 13.
3 Inst. 221.
Dalt. c. 98.
Sum. 36.
Cr. m. 30.
F. Cor. 192,
258, 261.
1 Hale 489.
Foster 271.

Sec. 11. And First, Homicide in the advancement of public justice in criminal causes may be justified in several cases; as, first, if a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them.

Furem si alter capi non possit, occidit permittunt. Sternb. de jure Gorb.

See authorities
above cited.
F. Cor. 179,
261.

Sec. 12. Secondly, If an innocent person be indicted of a felony, where, in truth no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may lawfully be killed by him, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer.

Sec. 13.

Sec. 13. Thirdly, If a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 Hale 481, 494. 495, 496.

Sec. 14. Fourthly, If those who are engaged in a riot, or a forcible entry, or detainer, stand in their defence, and continue the force in opposition to the command of a justice of peace, &c. or resist such justice endeavouring to arrest them, the killing of them may be justified; and so perhaps may the killing of dangerous rioters by any private persons, who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the purposes aforesaid. Crom. 30. 158. 1 Sum. 37. Staund. 13. 2 Inst. 53. Poph. 121.

Therefore a stranger who interposes to part the combatants in an affray, giving notice to them of that intention, and they assault him; if in the struggle he should chance to kill, this would be justifiable homicide; for it is every man's duty to interpose for the preservation of the public peace, and for the prevention of mischief. Foster 272. Vide also the Riot Act, 1 Geo. 1. c. 5.

Sec. 15. Fifthly, If trespassers in a forest, chace, park, or warren, or any inclosed ground wherein deer are kept, will not render themselves to the keepers upon an hue and cry made to stand to the king's peace, but fly from, or defend themselves against them, they may be slain by force of the statute *de malefactoribus in parcis*, 21 Ed. 1. ft. 2. and 3 and 4 Will. & Mary, c. 10. S. P. C. 13. Crom. 30. Dyer 326. 1 Hale 491. 9 St. Tr. 315.

Sec. 16. Sixthly, If either of the parties fighting in a combat allowed by law, for the trial of some special cases, be slain, he who kills him is justified, and the death of the other is imputed to the just judgment of God, who is presumed to give the victory to him who fights in maintenance of the truth. Dalt. c. 98. Plow. 9. 3 Inst. 221. 37 Il. 6. 21.

BUT in all these cases there must be an apparent necessity on the officer's side, that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer stealers could not but escape, unless such homicide were committed: otherwise without such absolute necessity it is not justifiable, 4 Comm. 180.

Sec. 17. Secondly, Homicide in the advancement of justice in civil causes, may also be justified in some cases.—As where a sheriff, &c. attempting to make a lawful arrest in a civil action, or to retake one who has been arrested and made his escape, is resisted by the party, and unavoidably kills him in the affray. 1 Roll. 189. Foster 270. Sum. 37. 3 Inst. 56. Crom. 24. Dalt. c. 98. 1 Hale 494. 4 Comm. 180.

Sec. 18. And in such case the officer is not bound to give back, but may stand his ground and attack the party. Sum. 37. Foster 292. Searge 499. 6 St. Tr. 195.

Sec. 19. But no private person of his own authority can arrest a man for a civil matter, as he may for felony, &c. Crom. 30.

Sum. 37.
1 Hale 481.
Post. 161.
Foster 271.

Sett. 20. Neither can the sheriff himself lawfully kill those who barely fly from the execution of any civil process.

Puff. L. of N.
455.

AND now I am to consider justifiable homicide of a private nature, in the just defence of a man's person, house, or goods. In treating whereof I shall shew, First, in what cases the killing of a wrong-doer may be justified by reason of such defence. Secondly, where the killing of an innocent person may be so justified.

24 H. 8. c. 5.
Dalt. c. 98.
1 Hale 486,
487, 493, 494.
Sum. 32.
S. P. C. 14.
B. Car. 100,
102.
F. Cor. 179,
192, 194, 261,
305.
C. Car. 544.
26 Aff. 23.
Crom. 26.
Kely. 128, 129.
Fos. 271, 275.
9 Ann. c. 16.
(a) Vide *sect.* 25.

Sett. 21. And first the killing of a wrong-doer, in the making of such defence, may be justified in many cases: As where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants, or lodgers, &c. kill one who attempts to burn it, or to commit in it murder, robbery, or other felony (a); or a woman kills one who attempts to ravish her; (1) or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprize, and under just apprehensions of the like attempt upon himself:—But in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c.

(1) The injury intended can never be repaired or forgotten; and nature to render the sex amiable hath implanted in the female heart a quick sense of honour, the pride of virtue which kindleth and inflameth at every such instance of brutal lust. Fos. 274. Bac. El. 34. Prin. P. L. 211.—So too, the feelings of a parent or a husband which involuntarily actuate them at the moment to kill the forcible ravisher of a wife or a daughter's virtue, are justifiable. 1 Hale 488. And no doubt the forcibly attempting a crime of a still more detestable nature may be equally resisted by the death of the unnatural aggressor. 4 Comm. 181.

Crom. 27.
Sum. 56.
1 Hale 405,
440, 441.

Sett. 22. Neither shall a man in any case justify the killing another by a pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, in defence of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully detain a house by force, and kill those who attack it from without, and endeavour to burn it.

Sum. 40, 57.
C. Car. 538.
Dalt. c. 98.
1 Hale 485,
486, 488.
Foster 273.

Sett. 23. Neither can a man justify the killing another in defence of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another, who claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he is forbidden, is guilty of manslaughter; and he who in his own defence kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty of homicide *se defendendo*, for which he for-

feits

feits his goods, but is pardoned of course; yet it seems that a private person, and, *a fortiori*, an officer of justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty in aid of the public justice.

Pult. 119.
Sum. 40.
Crom. 23.
3 Inst. 138.
Poph. 121.

Sec. 24. And I can see no reason why a person, who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shews an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may not justify killing such an assaillant, as much as if he had attempted to rob him: For is not he, who attempts to murder me, more injurious than he who barely attempts to rob me? and can it be more justifiable to fight for my goods, than for my life? And is it not only highly agreeable to reason, that a man in such circumstances may lawfully kill another, but it seems also to be confirmed by the general tenor of our law-books, which speaking of homicide *se defendendo*, suppose it done in some quarrel or affray; from whence it seems reasonable to conclude, that where the law judges a man guilty of homicide *se defendendo*, there must be some precedent quarrel in which both parties always are, or at least may justly be supposed to have been, in some fault, so that the necessity, to which a man is at length reduced to kill another, is in some measure presumed to have been owing to himself: For it cannot be imagined, that the law, which is founded on the highest reason, will adjudge a man to forfeit all his goods, and put him to the necessity of purchasing his pardon, without some appearance of a fault. And though it may be said, that there is none in chance-medley, and yet that the party's goods are also forfeited by that, I answer, that chance-medley may be intended to proceed from some negligence, or at least want of sufficient caution in the party, who is so unfortunate as to commit it, so that he doth not seem to be altogether faultless. Besides, one of the reasons given in our law-books for which homicide *se defendendo* forfeits goods, is because thereby a true man is killed; but it seems absurd, that he who apparently attempts to murder another, which is the most heinous of all felonies, should be esteemed such, when those who attempt other felonies, which seem to be much less criminal, are allowed to be killed as downright villains, not deserving the protection or regard of the law.

Bendlow 47.
1 And. 41.
Kely. 128, 129.
1 Hale 481, 484.
Foster 274.

Crom. 27, 28.
Dalt. c. 98.
S. P. C. 15.
3 Inst. 57.
Vide F. Cor.
284, 286, 287.
Bacon 33.

S. P. C. 15.
Dalt. c. 98.
Foster 288.

Sec. 25. However, perhaps in all these cases, there ought to be a distinction between an assault in the highway and an assault in a town. For in the first case it is said, that the person assaulted may justify killing the other without giving back at all; but that in the second case, he ought to retreat as far as he can without apparently hazarding his life, in respect of the probability of getting assistance. † And by 24 Hen. 8. c. 5. it

N. Bendl. 47.
Crom. 27, 28.
Dalt. c. 98.
Sum. 42.
Foster 273.

is

Puff. l. 2. c. 5.
Bract. 155.
1 Hale 487.
1 And. 41.
Kely. 51.
Prin. P. L. 211.
26 Aff. 23.

is recited, "Forasmuch as it hath been in question and ambiguity, that if any evil disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common high-way, cartway, horseway, or foot-way, or in their mansions, messuages, or dwelling-places; or that feloniously do attempt to break open any dwelling house in the night-time, should happen, in the prosecution of such felonious intent, to be slain by him or them whom the said evil doers should so attempt to rob or murder, or by any person or persons being in their dwelling house, which the same evil doers should so attempt burglarily to break by night, if the said person so happening in such cases to slay the offender so attempting to commit murder or burglary, should forfeit or lose his goods or chattles for the same, as any other person should do that by chance medley should happen to kill another in his or their defence." For the declaration of which ambiguity and doubt, it is enacted, "That whoever shall be indicted or appealed of or for the death of such evil disposed person or persons attempting to murder, rob, or burglarily to break mansion houses as aforesaid, shall not forfeit any lands, tenements, goods or chattles, but shall be thereof, and for the same fully acquitted and discharged." (1)

(1) Not only the master of a house, but a lodger or sojourner who kills an assailant, intending to commit murder or robbery, is within the protection of this statute, Cro. Car. 544. But this reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery or arson. 4 Comm. 180. Vide 1 Hale 488. And although it is the highest possible invasion of property, a man is not justifiable in killing another whom he taketh in adultery with his wife, for it favours more of sudden revenge than of self preservation; but this law hath been executed with great benignity. Ven. 159. Ray. 212. Prin. P. L. 212. If the husband however, detect the ravisher in the attempt, the wife calling for assistance, it is excusable *se defendendo*. 1 Hale 436.

Dalt. c. 98.

Bac. Elem. c. 5.
4 Comm. 187.

Sec. 26. Secondly, Also the killing of an innocent person, in the defence of a man's self, is said to be justifiable in some special cases, as, if two be shipwreck'd together, and one of them get upon a plank to save himself, and the other also, having no other means to save his life, get upon the same plank, and finding it not able to support them both, thrust the other from it, whereby he is drowned, it seems that he, who thus preserves his own life at the expence of that of another, may justify the fact by the inevitable necessity of the case.

C. Car. 538.

March 5.

1 Hale 42, 43.

Sec. 27. If a man be awakened in the night with an alarm that thieves are in his house, and searching for them in the dark with his sword drawn, happen to kill a person, lying hid in a part of the house, who in truth had no ill design, and was brought thither by a servant in order to assist in cleaning the house, it seemeth that he may justify the fact, inasmuch as it hath not the appearance of a fault.

CHAPTER THE TWENTY-NINTH.

OF EXCUSABLE HOMICIDE.

EXCUSABLE homicide is either *per infortunium*, or *se defendendo*.—In treating of which I shall first shew the nature of each of them distinctly, and then consider those properties wherein they both agree.

SECT. 1. And first of homicide *per infortunium*, or by misadventure, which is where a man in doing a lawful act (1), without any intent of hurt, unfortunately chances to kill another; Sum. 31.
1 Hale 472.
St. Tr. 3301.
Strange 462.
Prin. P. L. 214.

(1) Whether the act must be strictly lawful to bring the homicide within this description, Vide Fof. 258, 259. 3 Inst. 56.

SECT. 2. As first, Where a labourer being at work with a hatchet, the head thereof flies off, and kills one who stands by. 6 Ed. 4. 7.
B. Cor. 59, 148.

SECT. 3. Secondly, Where a third person whips a horse on which a man is riding, whereupon he springs out, and runs over a child and kills him, in which case the rider is guilty of homicide, *per infortunium*; and he who gave the blow, of manslaughter. Sum. 58, 59.
1 Hale 476.
4 Comm. 182.

SECT. 4. Thirdly, Where a workman, having first given loud warning to all persons to stand clear, flings down a piece of timber from a private house standing out of the road, and thereby kills one who happens to be underneath:—But if any person fling down such a piece of timber idly in play, or even a workman fling it down in the streets of a town, where the danger is apparent in respect of the number of people continually passing by, he is guilty of manslaughter. 1 Hale 472, 473.
Kely. 40.
Bract. l. 3. c. 4.
Dalt. c. 96.
Sum. 31.
B. Cor. 229.

SECT. 5. Fourthly, Where a schoolmaster in correcting his scholar, or a father his son, or a master his servant, or an officer in whipping a criminal condemned to such punishment, happens to occasion his death. Yet if such persons in their correction be so barbarous, as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least (2), and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, &c. or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder. 1 Hale 454, 473.
474.
Bract. l. 1. c. 4.
Sum. 51.
Crom. 28.
Dalt. c. 96.
Keilw. 136.
Skin. 668.
Kely 65.
5 Mod. 287, &c.
Foster 262.

(2) So when an officer of the impress service fires at a boat in order to bring her to, and kills a man, it is impossible that the offender should be made guilty of more than manslaughter, especially if he fires in the manner usual upon such occasions. L. Mansfield, Cowp. 832.

Keilw. 108.
B. Cor. 148.
Kely 41.
Prin. P. L. 226.
3 Will. 407.

Sec. 6. Fifthly, Where one lawfully using an innocent diversion, as shooting at butts, or at a bird, &c. by the glancing of an arrow, or such like accident, kills another.

Keilw. 108,
136.
Crom. 29.
11 H. 7. 23.
Foster 260.

Sec. 7. Sixthly, Where a person happens to kill another in playing a match of foot-ball, wrestling, or such like sports which are attended with no apparent danger of life, and intended only for the trial, exercise and improvement, of the strength, courage, and activity of the parties.

11 H. 7. 23.
3 Inst. 160.
1 Hale 473.
Keilw. 108,
136.
Sum. 31.
Dalt. c. 96.
Hob. 134.
Crom. 29.
Con. B. Cor. 22.
Foster 261.

Sec. 8. Seventhly, Where one kills another in fighting at barriers or tilting by the king's command, which by the better opinion, secures him from being guilty of felony, by reason of any such unfortunate accident.—† And under the 22. and 23 Car. 2. c. 25. and the 4 and 5 Will. and Mar. c. 23. made for the preservation of game, where a stranger assisting a game-keeper to seize nets even upon the ground of a third person, and, during the transaction, the gun of the stranger accidentally goes off, by which one of the poachers is killed, this is only chance medley, for the duty of the game-keeper will authorise the trespass of the stranger. (a)

(a) 9 St. Tr. 315.

Sum. 31, 32.
52, 57, 58.
Con. Hob. 134.
Dalt. c. 98.
Aley. 12.
1 Hale 472, 473.
Foster 292.
Strange 499.
6 St. Tr. 195.
4 Comm. 183.

Sec. 9. But if a person kill another by shooting at a deer, &c. in a third person's park, in the doing whereof he is a trespasser; or by shooting off a gun (3), or throwing stones in a city or highway, or other place where men usually resort; or by throwing stones at another wantonly in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by tilting or playing at handword without the king's command; or by parrying with naked swords covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter.

(3) Therefore where the defendant came to town in a chaise, and before he got out of it he fired his pistols, which by accident killed a woman, King, C. J. ruled it to be but manslaughter. Str. 481.

Kely. 117.
1 Hale 39. 475.

Sec. 10. And if a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other; as by committing a riot, robbing a park, &c. he shall be adjudged guilty of murder.

3 Inst. 56.
Kely. 117.
Sup. c. 27.
L. 4.
Sum. 52.

Sec. 11. And *a fortiori* he shall come under the same construction, who in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at tame fowl, with an intent to steal them, &c. for such persons are by

no means favoured, and they must at their peril take care of the consequence of their actions; and it is a general rule, That wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits.

Sec. 12. Neither shall he be adjudged guilty of a less crime, who kills another, in doing such a wilful act, as shews him to be as dangerous as a wild beast, and an enemy to mankind in general; as by going deliberately with a horse used to strike, or discharging a gun, among a multitude of people, or throwing a great stone or piece of timber from a house into a street, through which he knows that many are passing; and it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c.

Sec. 13. AND now I am to consider homicide *se defendendo*, which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempt be made upon him in his own house,) kills the persons by whom he is reduced to such an inevitable necessity.

Sec. 14. And not only he who on an assault retreats to a wall, or some such streight, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable necessity: but also he who being assaulted in such a manner, and such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all.

Sec. 15. And notwithstanding a person who retreats from an assault to the wall, give the other wounds in his retreat, yet if he give him no mortal one, till he get thither, and then kill him, he is guilty of homicide *se defendendo* only.

Sec. 16. And an officer who kills one that resists him in the execution of his office, and even a private person, that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all.

Sec. 17. According to some good opinions, even he who gives another the first blow on a sudden quarrel, if he afterwards do what he can to avoid killing him, is not guilty of felony. Yet such a person seems to be too much favoured by this opinion, inasmuch as the necessity to which he is at last reduced, was at the first so much owing to his own fault. And it is now agreed, that if a man strike another upon mistake prepense, and then fly to the wall, and there kill him in his own defence, he is guilty of murder.

Vol. I.

I

Sec. 18.

4 Comm. 186,
188.

Sec. 18. Thus far of each kind of excusable homicide distinctly considered.—And now I am to consider those properties wherein they both agree.

3 Inst. 56.
2 Inst. 149.
F. Cor. 116.
4 Comm. 182.

Sec. 19. And first it seems clear, That neither of these homicides are felonies, because they are not accompanied with a felonious intent, which is necessary in every felony.

11 H. 4. 93.
B. Cor. 80.
25 Aff. 7.
Post. f. 24.
Fof. 284, 285.

Sec. 20. And from hence it seems plainly to follow, That they were never punishable with loss of life: and the same also farther appears from the writ *de odio & atia*, by virtue whereof, if any person committed for killing another, were found guilty of either of these homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice, to condemn a man to death, for what is owing rather to his misfortune than his fault.

2 Inst. 56.
S. P. C. 16.
52 Hen. 3.
1 Hale 447.

Sec. 21. It is true indeed, that some of our best authors have argued from the statute of *Marlebridge*, c. 26. which enacts, That, "*Murdrum de cetero non adjudicetur, ubi infortunium tantummodo adjudicatum est, &c.*" That before this statute homicides by misadventure, or *se defendendo*, were adjudged murder, and consequently punished by death.

Bract. 134.
Kely. 121.
See 1 Hale 425.
448.

Sec. 22. But to this it may be answered, That murder in those days, signified only the private killing of a man by one, who was neither seen nor heard by any witness, for which the offender, if found, was to be tried by ordeal, and if he could not be found, the town in which the fact was done, was to be amerced sixty-six marks, unless it could be proved that the person killed was an *Englishman*; for otherwise it was presumed that he was a *Dane* or *Norman*, who in those days were often privately made away with by the *English*. And it being a doubt whether homicide by misadventure, &c. were to be esteemed murder in this sense, it seems to have been the chief intent of the makers of this statute to settle this question.

Bract. 135.

Sum. 98. 99.
2 Inst. 315.
Dalt. c. 98.
1 Hale 477.
Or they may be brought up by *habeas corpus*, and bailed.

Sec. 23. Secondly, It is certain, however, That notwithstanding neither of these offences be felonies, yet a person guilty of them is not bailable by justices of peace, but must be committed till the next coming of the justices of eyre or gaol-delivery.

Reg. 133.
2 Inst. 42, 315.
9 Co. 56.
4 Inst. 182.
Bract. 123.
Fleta b. 1.
c. 25.
S. P. C. 7.
2 Inst. 43, 315.

Sec. 24. Indeed anciently a person, committed for the death of a man might sue out the writ *de odio & atia*, which by *magna charta*, c. 26. is grantable without fee; and if thereon, by an inquest taken by the sheriff, he were found to have done the fact by misadventure, or *se defendendo*, he might be mainprized by twelve men, upon the writ *de ponendo in ballium*. But such writs and enquiries were taken away by the statute of *Gloucester*, c. 9. and 28 Edw. 3. c. 9. And though perhaps they were again revived by 42 Edw. 3. c. 1. which

which makes all statutes contrary to *magna charta*, void ; yet at this day they seem to be obsolete, and indeed useless, inasmuch as the party may probably be sooner delivered in the usual course, by the coming of the justices of goal-delivery.

9 Co. 56.
Co. Bail and
Mainp. c. 10.
Foster 285.
and vide 31 Car.
2. c. 2.

Sett. 25. Thirdly, it is also agreed, That no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead Not guilty, and give the special matter in evidence. And that wherever a person is found guilty of such homicide either upon a special indictment for the same, or by a verdict setting forth the circumstances of the case on a general indictment of murder or homicide, he shall be discharged out of prison upon bail and forfeit his goods : But that upon removing the record by *certiorari* into chancery, he shall have his pardon of course, without staying for any warrant from the king to that purpose, as shall be more fully shewn in the second book. ch. 37. sect. 1.

Ante c. 28. f. 3.
1 Hale 478.
4 H. 7. 2.
Keilw. 53. 108.
2 Inst. 316.
S. P. C. 15, 16.
F. Cor. 297,
354, 361.
Dalt. c. 96, 98.
F. N. B. 246.
Foster ch. 4.

CHAPTER THE THIRTIETH.

OF MANSLAUGHTER.

HOMICIDE against the life of another, amounting to felony, is either with or without malice.

Foster c. 5.
Dist. 2d.

Sett. 1. That which is without malice is called manslaughter, or sometimes chance-medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all.

4 Com. 186, 191.
Prin. P. L. 215
219, 224.
3 Inst. 55, 57.
Dalt. c. 94.
Sum. 56, 57.
1 Hale 466.

Sett. 2. And from hence it follows, That there can be no accessories to this offence before the fact, because it must be done without premeditation.

Sum. 217.
b. 2. c. 29.
f. 24.

Sett. 3. But the learning relating to this head, being for the most part co-incident with that of others, it will be superfluous to enlarge on it here ; and therefore I shall refer the reader to other chapters for the particular case ; as to the following chapter of murder from section 21 to 32. for those concerning duelling ; and to the said chapter, sections 47, 48, 49. and to chapter 28. sections 14, 15. for such as happen in a riot, &c. and to chapter 29 from section 6 to section 13. for such as fall out in the execution of a rash unlawful action.

Co. Lit. 127.
Kely. 55. 135.
1 Hale 456.

Sett. 4. But there is a particular kind of manslaughter proper to be considered here, from which the benefit of the clergy is taken away by 1 Jac. 1. c. 8. "Where any per-

"son shall stab or thrust any person or persons that hath not
 "then any weapon drawn, or that hath not then first stricken,
 "the party which shall so stab or thrust, so as the person or
 "persons so stabbed or thrust, shall thereof die within the
 "space of six months then next following, although it can-
 "not be proved that the same was done of malice fore-
 "thought." (1)

(1) This act is continued by 17 Car. 1. c. 4. "till some other act shall be made touching the continuance or discontinuance thereof."—For the reasons and occasion upon which it was passed, vide 4 Com. 193. Fost. 297. L. Ray. 140. 845. 7 Mod. 133. Skin. 668.

1 Bulst. 87.
 Kely. 55.
 1 Hale 456.
 Fof. 298.

Sec. 5. It is generally holden, that this statute is but declarative of the common law, and in the construction thereof, the following points have been resolved.

1 Jon. 340.
 Vide Skin. 668.
 where Lord Holt
 questions Bry-
 ant's case.

Sec. 6. First, That wherever a person who happens to kill another was struck by him in the quarrel before he gave the mortal wound, he is out of the statute though he himself gave the first blow.

Sum. 58.
 1 Hale 468.
 2 Hale 344.
 See b. 2. c. 33.
 f. 98.
 Styles 86.
 Salk. 542, 543.
 Prin. P. L. 232.
 Fost. 301.
 Alleyd 44.

Sec. 7. Secondly, That he only who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present, and aiding and abetting the fact, are within the statute: from whence it follows, That if it cannot be proved by whom the stroke was given, none can be found guilty within the statute.

1 Jones 432.
 confirmed by
 Holt in Maw-
 gridge's case,
 Kely. 131.
 Skin. 668.
 3 Lev. 266, 255.

Sec. 8. Thirdly, That the killing of a man with a hammer, or such like instrument, which cannot come properly under the words thrust, or stab, is not a killing within the statute.—But it seems that the discharging a pistol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words, "having a weapon drawn;" for penal statutes are construed strictly against the subject, and favourably and equitably for him.

See b. 2. c. 25.
 f. 117.
 Sum. 58, 266.
 Alleyd 47.

Sec. 9. Fourthly, That there is no need to lay the conclusion of the indictment *contra formam statuti*, because the statute makes no new offence, but only takes away the privilege of the clergy from an old one, and leaves it to the judgment of the common law; from whence it follows, That a person indicted on the statute, may be found guilty of manslaughter generally. Also from the same ground it hath been resolved, That if both an indictment lay, and a verdict also find, a fact to be *contra formam statuti*, which cannot possibly be so, as that A. and B. aided and abetted C. *contra formam statuti*, yet neither such indictment nor verdict are void, but A. and B. shall be dealt with in the same manner as they should have been, if those words *contra formam statuti* had been wholly omitted, because the substance of the indictment being found, they may be rejected as surplus and senseless: And, *a fortiori*, therefore it is certain, that they shall do no hurt to an in-
 dictment

Cro. Jac. 282.

dictment or verdict containing a fact which may be within the statute.

Sett. 10. Fifthly, How far the words *contra formam statuti*, supply a defect in an indictment, which does not specially pursue the statute, see the second book, chapter 25. section 116. See 1 Hale 467 to 470.

A PRISONER whose case may be brought within this statute is commonly arraigned upon two indictments, one at common law for murder, and the other upon the statute Fof. 299. But the same circumstances which at common law will serve to justify, excuse, or alleviate in a charge of murder, have always had their due weight in prosecutions grounded upon this statute. Fof. 298. As where a husband slays an adulterer whom he seizes in the act. 1 Vent. 158. Raym. 212. Or where a man is assaulted by thieves in his house, the thieves having no weapon drawn, nor having struck him; and he slays one of them. Stra. 469. Or where an officer entering violently into the chamber of a gentleman to arrest him, but without announcing the purpose for which he came, is stabbed by the gentleman with his sword. Kely. 136. 1 Hale 470. Styles 467. Or where upon an out-cry of thieves, a person who had innocently hidden himself in a closet, was mistaken for the thief and stabbed in the dark. 1 Hale 42. 474. C. Car. 538. W. Jones 429. Kely. 136. and many other instances of these kinds which have been held not within the statute.

CHAPTER THE THIRTY FIRST.

OF MURDER.

HOMICIDE against the life of another, amounting to felony with malice, is either murder or petit treason.

Sett. 1. And first of murder, which anciently signified only the private killing of a man, for which by force of a law introduced by king *Canutus* for the preservation of his *Danes*, the town or hundred where the fact was done, was to be amerced (a) to the king, unless they could prove that the person slain were an *Englishman*, (which proof was called *Engleschire*), or could produce the offender, &c. And in those days, the open wilful killing of a man through anger or malice, &c. was not called murder, but voluntary homicide.

Dialog. de Scacch. l. 1. c. 10. *Stiern. jure Saco*, l. 3. c. 3. Glanv. l. 14. c. 7. Foiter 281. Stat. Malbr. c. 26. Prin. P. L. 233. Bract. 134, 135. Kely. 121, &c. 1 Hale c. 447. Bract. 121.

(a) The amercement was 46 marks. Wilk. Ang. Sax. 280.

Sett. 2. But the said law concerning *Engleschire*, having been abolished by 14 Edw. 3. c. 4. the killing of any *Englishman* or foreigner through malice prepenſe, whether committed openly or secretly, was by degrees called murder; and 13 Rich. 2. c. 1. which restrains the king's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicide as shall not be pardoned without special words; and in the body of the act expresses the same by murder, or killing by await, assault, or malice prepenſed. And doubtless the makers of 23 Hen. 8. c. 1. which excluded all wilful murder of malice prepenſe from the benefit of the clergy, intended to include open, as well as private, homicide within the word murder.

S. P. C. 18, 19. 1 Hale 448.

Stamf. l. i. c. 10.
1 Hale 450.
3 Inst. 47.

Señ. 3. By murder therefore at this day we understand the wilful killing of any subject whatsoever, through malice forethought, whether the person slain be an *Englishman* or foreigner.

And for the better understanding hereof, I shall examine the following particulars:—First, In what cases a man may be said to kill another. Secondly, In what places such killing is within the cognizance of the law. Thirdly, Who are such persons by killing of whom a man may commit murder. Fourthly, What killing shall be adjudged to be malice prepenſe, or murder.

4 Comm. 196.
1 Hale 425, 432.
3 Inst. 48, 91.
Sum. 53.
Palm. 548.
1 Inst. 295.
2 Hawk. c. 29,
31.
9 Str. Tr. 146
to 251.

Señ. 4. As to the first point, viz. In what cases a man may be said to kill another; not only he who by a wound or blow, or by poisoning, strangling, or famishing, &c. directly causes another's death, but also in many cases, he who by willfully and deliberately doing a thing which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him.

Crom. 24, 90.
Pult. 122.
Dalt. c. 93.
1 Hale 431, 432.

Señ. 5. And such was the case of him who carried his sick father against his will, in a cold frosty season, from one town to another, by reason whereof he died.

Crom. 24.
Dalt. c. 93.
1 Hale 432.

Señ. 6. Such also was the case of the harlot, who being delivered of a child, left it in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof.

(a) S. P. C. 36. c.
3 Inst. 91.
Vide 14 Edw. 3.
c. 10.
(b) Dalt. c. 93.
Sup. c. 1. f. 7.
1 Hale 431, 436,
442, 467.
(c) Plowd. 474.

Señ. 7. And in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress (a) of imprisonment compels a man to accuse an innocent person who on his evidence is condemned and executed; or where one incites a (b) madman to kill himself or another; or where one lays (c) poison with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof.

9 Co. 82.
1 Hale 430,
431, 617.
F. Cor. 311.
S. P. C. 17.
Crom. 24.
Dalt. c. 93.
Pult. 122.
Sum. 53.
Exodus c. 21.
v. 29.
L. Raym. 143.
Pria. P. L. 236.

Señ. 8. Also he who wilfully neglects to prevent a mischief, which he may, and ought to provide against, is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who come near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted, as having himself feloniously killed him; and this is agreeable to the *Mosaic* law. However, as it is agreed by all, such a person is certainly guilty of a very gross misdemeanour.

Señ. 9.

Sec. 9. Also it is agreed, That no person shall be adjudged by any act whatever to kill another, who doth not die thereof within a year and a day after; in the computation whereof the whole day on which the hurt was done shall be reckoned the first.

Sum. 55.
Pult. 123.
Dalt. c. 93.
S. P. C. 21.

Sec. 10. But if a person hurt by another, die thereof within a year and a day, it is no excuse for the other that he might have recovered, if he had not neglected to take care of himself.

3 Inst. 53.
Kely. 26.
1 Keb. 17.
1 Hale 428.
Prin. P. L. 234.

A goaler, knowing a prisoner to be infected with an epidemick distemper, confines another prisoner against his will, in the same room with him, by which he catches the infection, of which the goaler had notice, and the prisoner dies; this is a felonious killing, *Str.* 856. 9 *St. Tr.* 146. So, to confine a prisoner in a low damp unwholesome room, not allowing him the common conveniencies which the decencies of nature require, by which the habits of his constitution are so effected as to produce a distemper of which he dies; this also is felonious homicide. *Str.* 884. *Ld. Raym.* 1578.—For although the law invests goalers with all necessary powers for the interest of the commonwealth, they are not to behave with the least degree of wanton cruelty to their prisoners. *O. B.* 1784. p. 1177. And these were deliberate acts of cruelty, and enormous violations of the trust the law reposes in its ministers of justice. *Foster* 322.

So also, any one who assuming to take care of another, refuses the necessary subsistence, or by any other severity though not of a nature to produce immediate death, as by putting the party in such a situation as may possibly be dangerous to life or health, if death actually and clearly ensues in consequence of it, it is murder.—And this mode of killing is of the most aggravated kind, because a long time must unavoidably intervene before the death can happen, and also many opportunities of deliberation and reflection. *O. B.* 1784. p. 455. and *Rex. v. S. Self.* *O. B.* Feb. *Seff.* 1776.

So also, by the old common law, to bear false witness, and with express premeditation, by this means to take away the life of another, was held to be murder. *Mirr.* c. 1. l. 19. *Brit. c.* 5. *Bract.* l. 3. c. 4. But it is said, that this enormous crime can hardly be so considered at this day. 3 *Inst.* 48. The authority, however, for this opinion, in *Foster* 131. is said by no means absolutely to warrant the conclusion. 4 *Comm.* 196.

Sec. 11. As to the second point, viz. In what places such killing is within the conuance of the law. It seems, That the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at common law, because it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, That the death of one who is both wounded and dies beyond sea; and it is said by some, That the death of him who dies here of a wound given there, may be heard and determined before the constable and marshal, according to the civil law, if the king please to appoint a constable. And it seemeth also to be clear, That such a fact being examined by the privy council, may by force of 33 *Hen.* 8. c. 23. be tried, in relation to the principal offenders, but not as to the accessaries, before commissioners appointed by the king in any county in *England*.

3 *Inst.* 48.
1 *Hale* 426.
2 *Inst.* 51.
Co. Lit. 75.
S. P. C. 65.
B. App. 153.
C. Car. 247.
b. 2. c. 23.
f. 12.
3 *Keb.* 785.
Con. 3 *Keb.* 715.
1 *And.* 195.

Sec. 12. A murder at sea was anciently cognizable only by the civil law, but now by force of 27 *Hen.* 8. c. 4. and 28 *Hen.* 8. c. 15. it may be tried and determined before the king's

1 Leon. 270.
Sum. 54.
3 Inst. 48.
Vide 4 Black.
Rep. 459.

king's commissioners (1) in any county of England according to the course of the common law. Yet the killing of one who dies at land of a wound received at sea, is neither determinable at common law, nor by force of either of these statutes: but it seems, that it may be tried by the constable and marshal, or before commissioners appointed, in pursuance of the aforesaid statute of 33 Hen. 8. c. 23.

(1) Namely, the admiral or his deputy, and three or four more (among whom two common law judges are constantly appointed, who in effect try all the prisoners) the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury. This is now the only method of trying marine felonies in the court of admiralty: The judge of the admiralty still presiding therein, just as the lord mayor presides at the Sessions in London. 4 Comm. 266.

† And for preventing any failure of justice, and for taking away all doubts touching the trial of murders in the cases hereinafter mentioned, it is enacted by the 2 Geo. 2. c. 21. "That where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of *England*, and shall die of the same stroke or poisoning within *England*;—or where any person shall be feloniously stricken or poisoned at any place within *England*, and shall die of the same stroke or poisoning upon the sea, or at any place out of *England*; an indictment thereof found by the jurors of the county of *England* in which such death, stroke, or poisoning shall happen respectively as aforesaid, whether before the coroners upon the view of such dead body; or before the justices of the peace, or other justices or commissioners who shall have authority to enquire of murders, shall be as good and effectual in law as well against the principals and accessories as if such felonious stroke and death, or poisoning and death, and the offence of such accessories had happened in the same county where such indictment shall be found; and the justices of gaol delivery and oyer and terminer in the same county; and also any superior court, in case such indictment shall be removed, &c. shall and may proceed upon the same in all points, as they might or ought to do in case such stroke, poisoning or death, &c. had happened in the same county where such indictment shall be found."

3 Inst. 48, 49.
1 Hale 426.
B. Cor. 140,
141, 143.
Indict. 13, 45.
S. P. C. 90.
6 H. 7. 10.
Finch. 411.
S. P. C. 182. c.
45 Aff. 9.
B. App. 3, 8c,
83, 85, 149.

Sec. 13. It is said by some, That the death of one who died in one county, of the wound given in another, was not indictable at all at common law, because the offence was not compleat in either county, and the jury could enquire only of what happened in their own county. But it hath been holden by others, That if the corps were carried into the county where the stroke was given, the whole might be enquired of by a jury of the same county: And it is agreed, That an appeal might be brought in either county, and the fact tried by a jury returned jointly from each: And at this day, by force

of

of 2 and 3 Edw. 6. c. 24. the whole is triable by a jury of the county where the death shall happen, on an indictment found, or appeal brought, in the same county.

Secd. 14. Also by force of 26 Hen. 8. c. 6. a murder in Wales may be enquired of in an adjoining English county. But appeals must still be brought in the proper county.

1 Lev. 118. Litch. 12, 118. 3 Inst. 50. 8 Mod. 136, 146. Stra. 502, 553. 6 Mod. 147. Vaugh. 413. Sid. 179. Keb. 621, 663, 677. Will. 320. Atk. 175, 182. Vent. 93.

Secd. 15. As to the third point, *viz.* Who are such persons by killing of whom a man may commit murder. It is agreed, that the malicious killing of any person, whatsoever nation or religion he be of, or of whatsoever crime attained, is murder.

Secd. 16. And it was anciently holden, That the causing of an abortion, by giving a potion to, or striking, a woman big with child, was murder. But at this day, it is said to be a great misprision only, and not murder, unless the child be born alive, and die thereof, in which case it seems clearly to be murder, notwithstanding some opinions to the contrary (*a*). And in this respect also, the common law seems to be agreeable to the *Mosaic*, which as to this purpose is thus expressed, "If men strive and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow, he shall be surely punished, according as the woman's husband will lay upon him, and he shall pay as the judges determine; and if any mischief follow, then thou shalt give life for life."

Braet. 121.
S. P. C. 21.
B. Cor. 91.
Sum. 53.
F. Cor. 146,
183, 263.
(a) Vide 1 Hale
433.
23 Aff. 94.
b. 2. c. 29.
f. 18.
3 Inst. 50.
3 Aff. 2.
B. Cor. 68.
Dalt. c. 93.
Exodus c. 21.
v. 22, 23.

Secd. 17. It seems also agreed, That where one counsels a woman to kill her child when it shall be born, who afterwards does kill it in pursuance of such advice, he is an accessory to the murder. † But in the case of the murder of bastard children by the unnatural mother, it is difficult to prove that the child was born alive; and it is therefore enacted by 21 Jac.

Dyer 186.
1 Hale 433,
429.
3 Inst. 51.
Kely. 127.

1. c. 27. made perpetual by 16. Car. 1. c. 4. "That if any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, except such mother can prove by one witness that such child was born dead, she shall suffer death as in case of murder."

4 Comm. 193.
Barrington. 425.
Prin. P. L. 16.
O. B. 1784. p.
1223.

Secd. 18. As to the fourth point, *viz.* What killing shall be adjudged of malice prepense or murder. It is to be observed, That any formed design of doing mischief, may be called

Fost. 256, 257.
Kely. 130.
1 Hale 451 to
454.

called malice; and therefore that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice prepense, and consequently murder.

Kely. 129, 130.
1 Hale 455, &c.
9 St. Tr. 715.
Prin. P. L. 236.

Sett. 19. And according to this notion, I shall consider, First, Such murder as is occasioned through an express purpose to do some personal injury to him, who is slain in particular, which seems to be most properly called express malice.—Secondly, Such as happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who is slain, in which case the malice seems to be most properly said to be implied.

Sett. 20. As to murder in the first sense, such acts as shew a direct and deliberate intent to kill another, as poisoning, stabbing, and such like, are so clearly murder, that I know not any questions relating thereto worth explaining.

But the cases which have borne dispute, have generally happened in the following instances—First, In duelling.—Secondly, In killing another without any provocation, or but upon a slight one.—Thirdly, In killing one whom the person killing intended to hurt in a less degree.

Bulst. 86, 87.
Kely. 129.
10 St. Tr. 139.

(a) 2 Bulst. 147.
Crompt. 22.
(b) 1 Roll. 360.
3 Bulst. 171.
Sum. 48.
1 Hale 452, 453.
O. B. 1784.
Nº 776.

Sett. 21. As to the first instance of this kind, it seems agreed, that wherever two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alledging that he was (a) first struck by the deceased; or that he had often (b) declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation; or that he meant not to kill, but only to disarm, his adversary: For since he deliberately engaged in an act highly unlawful, in defiance of the laws, he must at his peril abide the consequences thereof.

3 Inst. 51.
Sum. 48.
Kely. 56.
1 Lev. 80.
Foster 297.
Oneby's case, 9
St. Tr. 22.

Sett. 22 And from hence it clearly follows, That if two persons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder.

Sec. 23. And wherever it appears from the whole circumstances of the case, That he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or perhaps if he have so much consideration, as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c.

Kely. 56. 27.
1 Sid. 177.
Foster 297.
Strange 773.
Ld. Ray. 1489.
1493.

1 Lev. 180.

Sec. 24. And if A. on a quarrel with B. tell him that he will not strike him, but that he will give B. a pot of ale to strike him, and thereupon B. strike, and A. kill him, he is guilty of murder, for he shall not elude the justice of the law by such pretence to cover his malice.

Sum. 48.

Sec. 25. In like manner if B. challenge A. and A. refuse to meet him, but in order to evade the law, tell B. that he shall go the next day to such a town about his business, and accordingly B. meet him the next day in the road to the same town, and assault him, whereupon they fight, and A. kills B. he seems guilty of murder, unless it appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting.

1 Hale 453.
Con. Crom. 22.
and Sum. 48.

Sec. 26. And at this day it seems to be settled, That if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder, in respect of his first intent.

Crom. 22.
Dalt. 93.
Sum. 47.
Kely. 58, 129.

Sec. 27. And it hath been adjudged, That even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another, as to make a push at him with a sword, or strike at him with any other such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him, which violent revenge is no more excused by such a slight provocation, than if there had been none at all.

Crom. 23.
Dalt. c. 93.
Kely. 61. 137.
Ld. Ray. 1489.
9 St. Tr. 62.

Sec. 28. But it is said, That if he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him, and kill him, he is guilty of manslaughter only, because that by neglecting the opportunity of killing the other before he was on his guard, and in a condition to defend himself, with a like hazard to both, he shewed that his intent was not so much to kill, as to combat with the other, in compliance with those common notions of honour, which prevailing over reason, during the time that

Kely. 55, 61,
131.
Ld. Ray. 1493.
10 St. Tr. 518.
Foster 297.
2 Roll 461.

a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepense.

Sum. 48.
3 Inst. 51.
3 Hale 453.
3 Bulst. 17.

Sec7. 29. And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field and there one kill the other, he is guilty of manslaughter only, because he did it in the heat of blood.

3 Hale 452.
Crom. 23.
Dalt. c. 93.
Sum. 49.
1 Roll 360.
3 Bulst. 171.

Sec7. 30. And such an indulgence is shewn to the frailties of human nature, That where two persons who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the fact.

Sum. 51.
Dalt. c. 93.
1 Freem. 514.
O. B. 1784 p.
1043.
3 Hale 443.
Sum. 51.
11 St. Tr. 114.
Prin. P.L. c. 19.

Sec7. 31. But the law so far abhors all duelling in cold blood, That not only the principal who actually kills the other, but also his seconds are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the person killed are also equally guilty, in respect to that countenance which they give to their principals in the execution of their purpose, by accompanying them therein, and being ready to bear a part with them: But some have thought this rather too severe a construction to make a man by such reasoning the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel.

Foster 355.
12. Ray. 1493.
Kely. 27.
Strange 773.

Sec7. 32. And now I am to consider the second instance of this kind, viz. such murder as happens in killing another without any provocation, or but upon a slight one; as to which it is to be observed, that wherever it appears that a man killed another, it shall be intended, *prima facie*, that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden provocation, &c.

Cro. Ells. 694.
Id. Ray. 144.
3 Inst. 557.
(a) Kely. 123.
3 Hale 455, 456.
473.
3 Roll. 460, 461.
(b) Kely. 131,
&c.
Dalt. c. 93.
(c) C. Eliz. 779.
Noy 171.
1 Sid. 277.
1 Lev. 180.
Hob. 121.
Con. 1 Jon. 438.
Kely. 55, 61,
131. C. Jac. 296.
422. Styles 467.

Sec7. 33. Also it seems to be agreed, That no (a) breach of a man's word or promise, no trespass either to (b) lands or goods, no affront by bare (c) words or gestures however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such assault, whether the person slain did at all fight in his defence or not; for so base and cruel a revenge cannot have too severe a construction.

Vide Fos. 295.
1 Hale 456.

Sec7. 34. But if a person so provoked had beaten the other only in such a manner, that it might plainly appear that he

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meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard, and then in fighting with him had killed him, he had been guilty of manslaughter only.

Sec. 35. And of the like offence shall he be adjudged guilty, who seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other.

Sec. 36. Neither can he be thought guilty of a greater crime, who (a) finding a man in bed with his wife, or being actually (b) struck by him, or pulled by the nose, or filipped upon the forehead, immediately kills him; or, (c) who happens to kill another in a contention for the wall; or (d) in the defence of his person from an unlawful arrest; or (e) in the defence of his house from those who claiming a title to it attempt forcibly to enter it, and to that purpose shoot at it, &c. or in (f) the defence of his possession of a room in a publick house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing the assailant hath been holden by some to be justifiable: But it is certain, That it can amount to no more than manslaughter.

Sec. 37. Nor was he judged criminal in a higher degree, who seeing his son's nose bloody, and being told by him, That he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat him with a small cudgel, whereof he afterwards died. (1)

(1) Nor was he thought more criminal, who, duped and encouraged by a concourse of people, threw a pickpocket into a pound, adjoining to the road, in order to avenge the theft by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned; for although this mode of punishment is highly injutable and illegal, yet the law respects the infirmities and imbecilities of human nature where certain provocations are given. O.B. 1785. No. 751.—So also where three Scotch soldiers were drinking together in a public house, one of them struck some strangers who were drinking in another box with a small rattan; they having used several opprobrious epithets, and reviled the character of the Scotch nation. An altercation ensued; and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle. The altercation increased, and, when the soldier had paid the reckoning, the stranger again shoved him from the room into the passage. Upon this the soldier exclaimed, that "he did not mind killing an Englishman more than eating a mess of crowdy." The stranger, assisted by another person, then violently pulled the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged manslaughter. Lord Mansfield, 5 Burr. 2799. Vide also the King v. Snow, tried before Mr. Justice Willes, Sum. Ass. N. r. t. Hampton, 1786, and Rex v. John Brown for the murder of J. Maccafer, June 1776. But in these, and indeed in every other case of homicide upon provocation now great soever it be, if there is a sufficient time for passion to subside, and for reason to interpose, such homicide will be murder, Foil. 271. 296. 1 Hale, 486. 1 Ven. 153. Ray. 212.

Sec. 38. AND now we are come to the third instance of this kind, viz. Such murder as happens in killing one whom the person killing intended to hurt in a less degree; as to which it is to be observed, That wherever a person in cool

Jones 198. Palm. 585. Str. 771. Ld. Ray. 1429. 1437.

blood,

blood, by way of revenge, unlawfully and deliberately beats another in such a manner, that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far.

C. Car. 131.
W. Jon. 198.
Palm. 545.
Kely. 127.
Sum. 49.
1 Hale 454.
Foster 292.

Sec. 39. Also it seems, That he, who upon a sudden provocation, executeth his revenge in such a cruel manner, as shews a cruel and deliberate intent to do mischief, is guilty of murder, if death ensue; as where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail and beat him, whereupon the horse ran away and killed him.

Pris. P. L. 226.

Sec. 40. AND now I am to consider the second general branch of this head, viz. In what cases such killing shall be adjudged murder which happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain.

And this I shall consider in the following instances:—First, Where the principal intention is to commit another felony.—Secondly, Where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain.—Thirdly, Where the chief motive is to assist a third person.—Fourthly, Where the direct design is to escape from an arrest.—Fifthly, Where the principal purpose is to usurp an illegal authority.—Sixthly, Where no mischief is intended at all.

1 Hale 465,
474.
Sum. 50.
Kely. 117.
Pris. P. L. 225.
Sum. 46, 50.
Dalt. c. 93.
Moor 87.
Flow. 101.

Sec. 41. As to the first particular, viz. Such killing as happens in the execution of an unlawful action, whereof the principal intention was to commit another felony. It seems agreed, That wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as where a person shooting at tame fowl, with an intent to steal them, accidentally kills a man; or where one sets upon a man to rob him, and kills him in making resistance; or where a person shooting at, or fighting with one man, with a design to murder him, misses him and kills another.

Flow. 474.
3 Inst. 51.
1 Hale, 436,
441, 467.
9 Co. 81.

Sec. 42. And not only in such cases where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also where it any way occasionally causes such a misfortune, it makes him guilty of murder; and such was the case of the husband, who gave a poisoned apple to his wife, who eat not enough of it to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child who died thereof; such also was the case of the wife, who mixed ratbane in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation tasted it himself, having first stirred it about. Neither is

it material in this case, That the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as such a murderous intention, which of itself perhaps in strictness might justly be made punishable with death, proves now in the event the cause of the king's losing a subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power.

Sett. 43. But if one happen to be poisoned by ratsbane laid in order to destroy vermine, the person by whom he is so killed is guilty of homicide *per infortunium* only, because his intentions were wholly innocent. Flow. 474.
9 Co. 81.
1 Hale, 431.
Sum. 50.

Sett. 44. Also if a third person accidentally happen to be killed by one engaged in a combat with another upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only. But it hath been adjudged, That if a justice of peace, constable, or watchman, or even a private person, be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed, is guilty of murder; and that he cannot excuse himself by alledging that what he did was in a sudden affray in the heat of blood, and through the violence of passion; for he who carries his resentment so high, as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him but by doing their duty, and endeavouring to restrain him from breaking through his, shews such an obstinate contempt of the laws, that he is no more to be favoured, than if he had acted in cool blood. 1 Hale 441,
446, 457.
Sum. 455.
3 Inst. 52.
Dalt. c. 93.
F. Cor. 180.
Savil 67.
Kely. 66.
22 Aff. 71.
4 Co. 40.
9 Co. 68.
Crom. 25.
Fof. 308, 309.

Sett. 45. Yet it hath been resolved, That if the third person slain in such a sudden affray do not give notice (2) for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary. Kely. 66, 115.
Fof. 310, 311.
Staunf. 13.
1 Hale 442,
460, 461.
Ld. Ray. 1296.

(2) If the officer be within his proper district, and known, or but generally acknowledged to bear the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the day-time. *Foster* 135, 311.

Sett. 46. As to the second instance of this kind, viz. Such killing as happens in the execution of an unlawful action, where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain. It seems clear, That regularly, where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, hunting in a park, &c. and in so doing happen to kill a man, they are all guilty of murder; for they must at their 1 Hale 442, 443,
463, 534.
Sav. 67.
Minor 86.
Palm. 35.
Crom. 24, 25.
Sum. 47.
5 Mod. 289.
Dyer 128.
S. P. C. 17.
Foster 354.
9 St. Tr. 715.

peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation. (3)

(3) The fact however must appear to have been committed strictly in prosecution of the purpose for which the party was assembled, Prin. P. L. 234. Therefore if divers persons be engaged in an unlawful act, and one of them with malice prepenſe againſt one of his companions, finding an opportunity, kills him, the reſt are not concerned in the guilt of that act. Kely. 112. becauſe it hath no connection with the crime in contemplation. Prin. P. L. 235. So where two men were beating another man in the ſtreet, a ſtranger made ſome obſervation upon the cruelty of the act, upon which one of the two men gave him a mortal ſtab with a knife. Both the men were indicted as principals in the murder, yet, although both were doing an unlawful act in beating the man, as the death of the ſtranger did not enſue upon that act and it appearing that only one of them intended any injury to the perſon killed, the judges were of opinion that the other could not be guilty either as principal or acceſſary, and upon the caſe of the King v. Thomſon, Kely. 66, 67. he was acquitted. 8. Mod. 164. Trin. 9 Geo. 1. and 12 Mod. 629. Hill. 13 W. 3. Yet ſee 12 Mod. 256.

Crom. 28.
Sum. 56.
1 Hale 440,
441.
Feſter 312.

Secſ. 47. Yet where diverſe rioters having forcible poſſeſſion of a houſe, afterwards killed a perſon whom they had ejected, as he was endeavouring in the night forcibly to regain the poſſeſſion, and to fire the houſe, they were adjudged guilty of manſlaughter only, notwithstanding they did the fact in maintenance of a deliberate injury, perhaps for this reaſon, becauſe the perſon ſlain was ſo much in fault himſelf.

Sum. 45.
Dalt. c. 93.
3 Inſt. 52.
Kely. 66.
22 Aff. 71.
4 Co. 40.
9 Co. 68.
Crom. 25.

Secſ. 48. But if in ſuch or any other quarrel, whether it were ſudden or premeditated, a juſtice of peace, conſtable, or watchman, or even a private perſon, be ſlain in endeavouring to keep the peace and ſuppreſs the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he perſiſts in a leſs offence with as much obſtinacy, as to go on in it to the hazard of the lives of thoſe who no otherwiſe offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he ſeems to be in this reſpect equally criminal, as if his intention had been to commit a felony.

2 Hale, 437,
446.
Flow. 100, 101.
Crom. 23.
Dalt. c. 93.
Sum. 51, 52.
Savil. 67.
Palm. 30.

Secſ. 49. As to the third inſtance of this kind, viz. ſuch killing, as happens in the execution of an unlawful action, the principal motive whereof was to aſſiſt a third perſon. It ſeems clear, that if a maſter maliciously intending to kill another take his ſervants with him, without acquainting them with his purpoſe, and meet his adverſary and fight with him and the ſervants ſeeing their maſter engaged take part with him, and kill the other, they are guilty of manſlaughter only, but the maſter of murder.

Crom. 26.
Sum. 52, 57.
Dalt. c. 94.
1 Roll. 407,
408.
3 Bulſt. 206.
Cowp. 832.

Secſ. 50. And therefore it follows, *a fortiori*, that if a man's ſervant or friend, or even a ſtranger, coming ſuddenly, ſee him fighting with another, and ſide with him, and kill the other; or ſeeing his ſword broken ſend him another, wherewith he kills the other, he is guilty of manſlaughter only.

Kely. 67, 86,
87.
Foſt. 318, 319.
22 Mod. 368.

Secſ. 51. Yet in this very caſe, if the perſon killed were a bailiff, or other officer of juſtice, reſiſted by the maſter, &c.

in the due execution of his duty, such friend or servant, &c. are guilty of murder, whether they knew that the person slain were an officer or not.

Sett. 52. But perhaps it may be objected, That in this last case there seems to be no more malice than in the former; and such third person being wholly ignorant that the party killed was an officer, seems to be no more in fault than if he had been a private person.

Sett. 53. To this it may be answered, That all fighting is highly unlawful, and that he, who on a sudden seeing persons engaged in it, is so far from endeavouring to part them, as every good subject ought, that he takes part with one side, and fights in the quarrel, without knowing the cause of it, shews a high contempt of the laws, and a readiness to break through them on a small occasion, and must at his peril take heed what he does, and consequently might perhaps in strict justice be adjudged in the foregoing cases to act with malice, which doth not always signify a particular ill will against the person killed, as appears by many of the above-mentioned cases; and though such person be favoured in respect of the suddenness of the occasion, where both the quarrel and the persons are private, yet he must not expect such indulgence where the fight, in which he so rashly engages, was begun in open opposition to the justice of the nation, and a person happens to be killed thereby who engaged in maintenance thereof, and on that account is under its more particular care; and may justly challenge, that his opposers be made examples to deter others from joining in such unwarrantable quarrels.

Sett. 54. But if a man seeing another arrested and restrained from his liberty, under colour of a pre-s-warrant or civil process, &c. by those who in truth have no such authority, happen to kill such trespassers in rescuing the person oppressed, he shall be adjudged guilty of manslaughter only, notwithstanding the injured person submitted to them, and endeavoured not to rescue himself, and the person who rescued him, did not know that he was illegally arrested; for since in the event it appears, that the persons slain were trespassers, covering their violence with a shew of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.

Sett. 55. As to the fourth instance of this kind, viz. Such killing as happens in the execution of an unlawful action, whereof the direct design was to escape from an arrest. It seems to be agreed, That whoever kills a sheriff, or any of his officers, in the lawful execution of a civil process, as on arresting a person upon a *capias*, &c. is guilty of murder.

Sett. 56. Neither is it any excuse to such a person that the process was erroneous, (for it is not void by being

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O.B. 1784, 775.
Fost. 271, 309,
318.

1 Sid. 160.
Noy 50.

Flow. 100.

Kely. 60, 137.
Cram. 27.
Ld. Ray. 1296.

Holt 485.

But the principles upon which this case was decided, are very elegantly and warmly controverted by Mr. Justice Foster, p. 315, to 318.

2 Hale, c. 83.
Dalt. c. 93.
1 Hale, 463.
Sum. 45.
Crom. 24.
Strange 499.
6 St. Tr. 195.
Foster 29, 139,
308.

9 Co. 65, 68.
C. Jac. 80, 425

1 Hale, c. 457. 458, 462. Fost. 137, 311, 312, 318. B. 2. c. 13. f. 28. 2 Hale, c. 85. 6 Co. 68, 69. so,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance;) or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one.

Sett. 57. Yet the killing of an officer in some cases will be manslaughter only.—As, First, Where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests *J. S.* a baronet, who never was knighted, by force of a warrant to arrest *J. S.* knight.

C.Car. 372, 537.
1 Hale, 56, 457, 460.
1 Jon. 346.
1 Lev. 91.
12 Co. 49.
Jones, 429. 4 Inst. 333.

Sett. 58. Secondly, Where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arrest a man; or perhaps if he arrest one on a *Sunday* since 29 Car. 2. c. 7. by which all such arrests are made unlawful.

6 Mod. 173.
Sum. 46.
Ld. Ray. 1028.
Foster 311, 319.
2 Roll. 137.
Palm. 52.
1 Hale 458.
5 Co. 93. 2 Hale 117, 470. Salk. 79.

Peace officers having a *legal* warrant to arrest for a breach of the peace, may break open doors, after having given due notice and demanded admittance, Fost. 136. but they cannot justify breaking open *outward* doors or windows to execute a civil suit, Fost. 319, 320. Cowp. 3. Therefore, where a man, who had been arrested, by the artful contrivance of an officer upon civil process, (that of the warrant having been filed up after it had been sealed) obliged the officer to decamp by snapping a pistol at him three times, but the officers returning to the house, accompanied by the plaintiff and the attorney; and all three attempting to force in, the man within fired a gun through the door and shot the attorney, it was ruled manslaughter only, 10 St. Tr. 462. See also the arguments in the London Magazine for August, 1759. Fost. 311, 312.

Sett. 59. As to the fifth instance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, whereof the principal purpose was to usurp an illegal authority. It seems clear, That if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of any known jurisdiction, which clearly extends not to cases of this nature; as if the court of Common Pleas cause a man to be executed for treason or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder.

Vide Sup. c. 28. f. 5.
Summary 46.

Sett. 60. But where persons act by virtue of a commission, which if it were strictly regular would undoubtedly give them full authority, but happens to be defective only in some point of form, it seems that they are no way criminal.

Sett. 61. As to the sixth instance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, where no mischief was intended at all. It is said, That if a person happen to occasion the death of another, inadvertently doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick among a multitude of people, by which he means no more than to divert himself by putting them into a fright, he is guilty of murder.

C. 29. f. 12.
3 Inst. 57.
Sum. 44.
O. B. 1785, No. 751.
12 Mod. 628.
Ld. Ray. 143.
Priz. P. L. 236.

Stat. 62. Also it hath been anciently holden, That if a person not duly authorized to be a physician or surgeon, undertake a cure and the patient die under his hand, he is guilty of felony; but inasmuch as the books wherein this opinion is holden, were written before the statute of 23 *H.* 8. which first excluded such felonious killing, as may be called wilful murder of malice prepenſe, from the benefit of clergy, it may be well questioned, whether such killing ſhall be ſaid to be of malice prepenſe, within the intent of that ſtatute; however it is certain highly raſh and preſumptuous for unſkilful perſons to undertake matters of this nature; and indeed the law cannot be well too ſevere in this caſe, in order to deter ignorant people from endeavouring to get a livelihood by ſuch practice, which cannot be followed without the manifeſt hazard of the lives of thoſe who have to do with them: But ſurely the charitable endeavours of thoſe gentlemen who ſtudy to qualify themſelves to give advice of this kind, in order to aſſiſt their poor neighbours, can by no means deſerve ſo ſevere a conſtruction from their happening to fall into ſome miſtakes in their preſcriptions, from which the moſt learned and experienced cannot always be ſecure.

S. P. C. 16.
Pulton 22.
Crom. 27.
43 Ed. 3. 33.
F. Cor. 163.
Britt. c. 5.
4 Inſt. 251.

1 Hale 429, 430.

See Dalt. c. 93.
4 Comm. 197.

For other particulars relating to this head, ſee the ſecond book.

chapter of principals and acceſſaries, in

CHAPTER THE THIRTY-SECOND.

OF PETIT - TREASON.

AT common law not only the offences ſpecified in the twenty-fifth of Edward the Third, but many others alſo were eſteemed petit treaſons, which are not ſo at this day; as (a) piracy by a ſubject; (b) diſcovery of the king's counſel by one of the grand jury; (c) an attempt by a wife to kill her husband, &c.

3 Inſt. 20, 21.

(a) 40 Aff. 35.
Inf. c. 37. ſ. 2.
(b) 27 Aff. 63.
3 Inſt. 22.

Dalt. c. 91. (c) S. P. C. 10. See 1 Hale 377, to 382.

But by 25 Edw. 3. no offence ſhall be adjudged petit treaſon, except in the following inſtances: Firſt, Where a ſervant kills his maſter; Secondly, Where a wife kills her husband; Thirdly, Where an eccleſiaſtical man, ſecular, or religious, kills his prelate to whom he owes obedience.

Stat. 2. And this ſtatute hath been ſo ſtrictly conſtrued, that no other caſe whatſoever, which cannot be brought within the meaning of theſe words, however it may be in its own nature more heinous, ſhall, by parity of reaſon, be expounded to be within the equity of them; and therefore the murder of a father by a ſon ſhall not be puniſhed as petit treaſon, unleſs the ſon may by a reaſonable conſtruction come under the word ſervant, ſerving the father for meat, drink, cloaths,

Plow. 86.
3 Inſt. 12. 81.
13. Eliz. c. 1. 11.

Daliſ. 14.
3 Inſt. 20.
Sum. 24.
Dalt. c. 91.
Crom. 19.

1 Hale, 380.
Lamb. 248.

cloaths, or wages, in which case he shall be indicted by the name of a servant. (1)

(1) "I am sorry," says an elegant writer upon criminal law, "that parricide is not comprehended within the class of petty treason, nor subjected by our laws to any degree of exemplary notice." Reiterated experience hath given a melancholy refutation to Solon's idea, "that it is impossible to commit so unnatural a barbarity." Prin. of P. L. 243.

1 Hale, 380.
B. Tref. 8, 12.

Plow. 86.
19 H. 6. 47.
3 Inst. 20.
4 Co. 46.

SecT. 3. Yet the murder of a mistress, or of a master's wife, has been adjudged petit treason within this statute, for notwithstanding the person slain can in neither of these cases, in good grammar, come under the word master, yet they are clearly within the meaning thereof, being used here to signify any person to whom another stands related as a servant.

33 Aff. 7.
B. Cor. 116.
S. P. C. 10.
Plow. 260.
1 Co. 99.
Sum. 24.
3 Inst. 20.

SecT. 4. Also the murder of a person by one who was his servant, upon malice conceived during the service, though it be not within the express words, is within the meaning of them, inasmuch as it is but the execution of the treasonable intention of the party, while he was a servant.

Sum. 24.
3 Inst. 20, 21,
138.
1 Hale, 379.
Dyer 332.

SecT. 5. Also the procuring, aiding, or abetting, of any of these offences, is clearly punishable within the meaning of this act, in the same manner as it was before; for the plain intent of the statutes is only to restrain the judges from proceeding against other crimes, as petit treasons, but no way to alter the law as to these.

Sam. 24.
1 Hale 378, 380.
Dalif. 16.
Dalt. c. 91.
Crom. 19, 20.

Dyer 254.
B. Cor. 119.

40 Aff. 25.
Sum. 215.
3 Inst. 20, 21,
139.

Crom. 19.
Dy. 128, 332.
Moor 91.
Dalif. 16.

SecT. 6. And therefore it seems agreed, That persons accused of petit treason shall be construed to be either not guilty at all, or principal or accessory, according to the known rules of law in other cases, and from hence it follows, That if the fact appear to have been done upon a sudden falling out, or in the party's necessary self-defence, &c. it cannot be petit treason. For inasmuch as all petit treason implies murder, and is the highest degree thereof, wherever the circumstances do not make the offence murder, they cannot make it petit treason; and *vice versa*, generally wherever the circumstances are such as will make the killing of a stranger by a stranger murder, they make the killing of a husband, or master, &c. petit treason. Yet it hath been adjudged, that if a wife or servant procure a stranger to kill the husband, or master, in the absence of such wife, or servant, neither the procurer nor actor are guilty of petit treason, but of murder only; because it is an allowed maxim, *That the offence of an accessory can never be of a higher kind than that of the principal*; but it seems clear, That if the wife or servant be either actually present, when the crime is done, or present only in judgment of law, as being in the same house, but not in the same room, (in which case the hopes of their immediate assistance encourages and emboldens the murderer to commit the fact, which otherwise perhaps he would not have dared to do, and makes them guilty in the same degree, as if they

they had actually stood by with their swords drawn, ready to second the villainy,) such wife, or servant, being principals as much as the stranger, are guilty of petit treason, and the stranger of murder; but it is said; That if a wife procure a servant to kill the husband, both are guilty of petit treason: And even if a stranger procure a wife, or servant, to kill the husband, or master, it seems that he may be indicted as accessory to petit treason. (2)

(2) A wife divorced *causa adulterii vel sœvitie*, is still within this law, because the bond of matrimony is not thereby dissolved, and she may again lawfully cohabit with her husband. But a divorce *causa consanguinitatis vel pre contractus*, entirely dissolves the nuptial tie, and annihilates the very character of wife. Therefore, a wife *de facto* only, and not *de jure*, cannot commit this crime, for she has no lawful lord to whom she owes subjection and obedience. Neither can a husband be guilty of this crime by killing his wife *de jure*, for there is no reciprocity of obedience and subjection.

† *Sec.* 7. A clergyman living and beneficed in one diocese who kills the bishop or metropolitan of that diocese, or of the diocese where he may be beneficed by dispensation; or the bishop who ordained him, may be guilty of this offence; for a canonical obedience results both from institution and ordination. (3)

(3) The law considers petty treason and murder as one offence, differing only in circumstance and degree; *Foet.* 327, and the principles that govern in the case of murder, are equally applicable to petty treason. 4 *Comm.* 204. An appeal of death will lie, and *autrefois acquit*, or attain in murder is a good bar in petty treason and *converso*. 2 *Hale*, 246, 232. 3 *Inst.* 213. It is included in a pardon under the name of murder. 1 *Hale*, 378. And the offender may be indicted either for petty treason, murder, or manslaughter, and tried and found guilty on such indictment, of either of those crimes respectively, according as the case may appear upon the evidence. 1 *Hale*, 378. *Foet.* 326.

But, if the prosecutor be apprized of the real case, he ought to adapt the bill to the truth of the fact. *Foet.* 324, 326. For, though the offences are to most purposes considered as substantially the same, yet there is some difference with regard to the judgment, and a very material one with regard to the trial. *Foet.* 327. The punishment is, in a man, to be drawn and hanged, and in a woman, to be drawn and burned. 1 *Hale*, 382. 3 *Inst.* 311. And on the trial, the prisoner is intitled to a peremptory challenge of thirty-five. *Foet.* 327. Two witnesses also are required both on the indictment and at the trial. 1 *Edw.* c. 12. *Foet.* 337. And the 5 and 6. *Edw.* 6 c. 11. by general words extending to all treasons, requireth that the witnesses, if living, shall be examined in person upon the trial in open court. Depositions therefore taken before the coroner, or informations taken by a justice of peace, are not evidence whereon to ground a conviction of petit treason, if the party be living, though unable to travel, or kept out of the way by the prisoner, or his procurement. *Foet.* 337.

† *Sec.* 8. Principals in this offence were first debarred the benefit of clergy by 12 *Hen.* 7. c. 7. and accessories both before and after, by 4 & 5 *Ph.* & *Ma.* c. 4.

CHAPTER THE THIRTY-THIRD.

OF SIMPLE LARCENY.

AND now we are come to offences against the goods of another, which are generally called larcenies, from the Latin word *Latrocinium*, of which there are two kinds: First, Simple larceny; Secondly, Mix'd larceny.

Simple larceny is also of two kinds, First, Grand larceny; Secondly, Petit larceny.

Secl. 1. Simple grand larceny is a felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another, not from the person, nor out of his house, above the value of twelve pence.

Sum. 60.
Dalt. c. 101.
1 Hale 503, 504.
Folter 121.

For the better explication of which definition, I shall in order consider the several parts of it; as, First, What shall be said to be a felonious and fraudulent taking; Secondly, What shall be said to be a carrying away; Thirdly, By whom the offence may be committed; Fourthly, What are such goods the taking whereof may be felonious; Fifthly, How far such goods ought to belong to another; Sixthly, Of what value they must be.

Secl. 2. As to the first particular, viz. What shall be said to be a felonious and fraudulent taking? It is to be observed, That all felony includes trespass, and that every indictment of larceny must have the words *felonice cepit*, as well as *asportavit*; (a) If a horse be stolen the indictment should run "*cepit et abduxit*." If a sheep, &c. "*cepit et effugavit*." 1 Hale 504. C. Cir. Com. 320.

Secl. 3. And from this ground it hath been holden, That one who finds such goods as I have lost, and converts them to his own use *animo furandi*, is no felon; and *a fortiori*, therefore, it must follow, That one who has the actual possession of my goods by my delivery, for a special purpose, as a carrier who receives them, in order to carry them to a certain place; or a taylor who has them in order to make me a suit of cloaths; or a friend who is intrusted with them to keep for my use, cannot be said to steal them, by embezzling of them afterwards.

Vide *secl. 6.*

3 Inst. 102, 103.
Sum. 61.
1 Hale, 504.
13 Ed. 4. 9, 10.
S. P. C. 25.

Secd. 4. And herein our law differs from the civil, which, agreeably to the *Mosaic* law, having no capital punishment for bare thefts, deals with offences of this kind as such, as in strict justice most certainly it may; but our law which punishes all theft with death, if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chuses to deal with them as civil than criminal offences, perhaps for this reason, in the above mentioned case, concerning goods lost, because the party is not much aggrieved where nothing is taken but what he had lost before; and for this cause in the other cases, concerning the imbeziling of goods delivered to another by the owner, because the party being intrusted with the whole possession, it may be presumed that both the offender and his offence are known, and consequently the person injured is supposed to have a remedy by action against him, from which consideration some have made it part of the definition of larceny, that it be committed without the knowledge of the owner; and it seems rigorous to have recourse to severe laws, where probably more gentle ones will be effectual.

S. P. C. 25.
See Exod. 22.

Dalt. c. 107.
Bract. l. 3. 150.
Fleta, l. 1. 36.
2 Hale, 290.

Secd. 5. And agreeably hereto, it has been resolved, That even those who have the possession of goods by the delivery of the party, may be guilty of felony by taking away part thereof, with an intent to steal it; as if a carrier open a pack and take out part of the goods; or a weaver who has received silk to work; or a miller who has corn to grind, take out part with an intent to steal it; in which cases it may not only be said that such possession of a part distinct from the whole, was gained by wrong, and not delivered by the owner, but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. (1)

1 Hale, 505.
13 E. 4. 9, 10.
S. P. C. 25.
Dalt. c. 102.
Kely. 35.
1 R. Abr. 73.

(1) To constitute larceny the property must be taken from the *possession* of the owner; therefore, where A. intending to go a distant journey, hires a horse, fairly and *bona fide*, for that purpose, and evidences the truth of such intention, by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery, and the delivery having been obtained without fraud or design, the owner parted with his possession as well as his property; O. B. 1784, p. 1294, and thereby gave to A. dominion over the horse, upon trust, that he would return him when the journey was performed. O. B. 1786, p. 333, 334.—But if the delivery of property be obtained with a preconcerted design to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains, in law, the constructive possession of it; therefore, where a man, having feloniously obtained the delivery of a bill of exchange under the fraudulent and delusive pretence of discounting it, converted it to his own use; and it appearing upon the evidence that the owner never meant to part with the possession, it was held to be felony; O. B. 1784, p. 294. so also where a horse was obtained with the same design, upon pretence of trying its paces; O. B. 1779, p. 363. O. B. 1784, p. 293. So also, to obtain the delivery of money, with design feloniously to take it away, under the false pretence of having found a diamond ring of great value, has been determined by nine judges to be a taking from the possession of the owner, and consequently felony; O. B. 1785, p. 160. So also to obtain the delivery of goods under pretence of purchasing them, and then to run away with them; Ray. 276. And, in general, where the delivery of the property is made for a certain, special, and particular purpose, the possession is still supposed to reside, unparted with, in the *first* proprietor. Therefore, where a master delivers goods to his servant to carry to a customer, but instead of so doing he converts them, on his way, to his own use, it is a felonious taking; for the master had a right to countermand the delivery of them, and therefore the possession remained in him at the time of the conversion; O. B. 1782, No. 375. O. B. 1783, No. 28. So also, if a watch

watch maker steals a watch, delivered to him to clean; O. B. 1779, No. 83. Or if one steal cloaths delivered for the purpose of being washed; O. B. 1758, No. 18. Or goods in a chest delivered, with the key, for safe custody; O. B. 1776, No. 83. Or guineas delivered for the purpose of being changed into half guineas; O. B. 1778, No. 52. Or a watch delivered for the purpose of being pawned; O. B. 1784, No. 613. In all these instances the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony.

3 H. 7. 12.
21 H. 7. 14.
B. Cor. 58, 137.
S. P. C. 25.
Dalt. c. 102.
Moor. 246.
O. B. 1784. p.
292.
Pop. 84.
1 Hale 505, 667.

Sec. 6. Also it seems generally agreed, That one who has the bare charge, or the special use of goods, but not the possession of them; as a shepherd who looks after my sheep, or a butler, who takes care of my plate, or a servant who keeps the key to my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony, in fraudulently taking away the same; for in all these cases the offence may as properly come under the word *cepit*; the injury to the owner is as great, and the fraud as secret, and the villainy more base, than if it had been done by a stranger. (2)

(2) Therefore, if the clerk to a banker or merchant has the care of money, or if he has access to it for special and particular purposes, and is sent to the bag or drawer for money, for the purpose of paying a bill, or if he is sent for the purpose of bringing money generally out of that bag or drawer, and at the time he brings that money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony as if he had had no permission or access to it whatever. So, if a servant be sent to a library for one particular book and he takes another, or being sent for a hat, and sword, and he steals a cane; in all these cases it has been said the offenders are guilty of felony; for though the property is delivered, the possession of it remains in the true owner; O. B. 1784, p. 1295, 1304. So also where a person being left in an apartment, pawns the furniture or other property under his care, with a felonious design to steal it, it is felony; O. B. 1785, p. 717. O. B. 1786, p.

Summary 62.
3 Inst. 107.
B. Cor. 160.
S. P. C. 25.
O. B. 1786, p.
234.
1 Hale, 505.

Sec. 7. Also it seems clear, That if a carrier, after he has brought the goods to the place appointed, take them away again secretly *animo furandi*, he is guilty of felony, because the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger.

1 Hale, 507.
3 Inst. 108.
Sum. 63.
Kely. 43.
1 Sid. 254.
Raym. 276.

Sec. 8. And not only he who first lays his hands on my goods himself, but in many cases he who receives them from another, may be guilty of feloniously taking them; as if a person intending to steal my horse, take out a replevin, and thereby have the horse delivered to him by the sheriff; or if one intending to rise my goods, gets possession from the sheriff, by virtue of a judgment obtained, without any the least colour or title, upon false affidavits, &c. in which cases the making use of legal process is so far from extenuating, that it highly aggravates the offence, by the abuse put on the law, in making it serve the purposes of oppression and injustice.

13 E. 4. 3.
Sum. 64, 69.
S. P. C. 61, 182.
B. App. 84, 100.
B. Coram 71.

Sec. 9. Also he who steals my goods from J. S. who had stolen them before, may be indicted, or appealed, as having stolen them from me, because in judgment of law, the possession as well as property always continued in me. And for this cause, he who steals my goods in the county of B. and carries them to the county of C. may be indicted or appealed in the county of C. as well as that of B. because the possession ~~remains~~ continuing

continuing in me, every moment's continuance of the trespass 4 H. 7. 5, 6. is as much a wrong to it, and may come under the word *cepit*, 1 Hale, 507. as much as the first taking. Yet a pirate carrying the goods whereof he robbed me at sea, into any county, cannot be indicted for felony there, because the original taking was not such a felony whereof the common law takes cognisance.

† But by 13 Geo. 3. c. 31. s. 4. "Any person having stolen, or otherwise feloniously taken money, cattle, goods, or other effects in either part of the United kingdom, who shall afterwards have the same, or any part thereof, in their possession in the other part of the United kingdom, may be indicted of larceny in that part where they are so found with the property as aforesaid; and by sect. 5. Receivers may be indicted in that part of the United kingdom where they shall receive, or have in their possession the property so stolen."

sect. 10. It seems not to have been clearly settled before 3 & 4 Will. & Mar. c. 9. whether a lodger, who stole the furniture of his lodgings, were indictable as a felon, inasmuch as he had a kind of special property in the goods, and was to pay the greater rent in consideration of them; but if it had appeared clearly, from the whole circumstance of the case, that the first intention of the party in coming to the house, was not to have the convenience of lodging in it, but only, under the colour thereof, to have the better opportunity of rising it, and to elude the justice of the law, by endeavouring to keep out of the letter of it, by gaining a possession of the goods with the consent of the owner, I cannot see any good reason why such a person should not be esteemed as much a felon as a mere stranger, inasmuch as his whole design was to defraud the law, and the consent of the owner was grounded on a supposition of his coming as a lodger, and could never have been gained if the truth had appeared, which the party shall get no advantage by falsifying: And it brings a contempt upon the justice of the nation to suffer its laws to be evaded by such little contrivances: However this question is now settled by the said statute, which hath enacted and declared, "That if any person or persons shall take away with an intent to steal, imbezil or purloin any chattel, bedding or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use, in or with such lodging, such taking, imbeziling, or purloining, shall be to all intents and purposes taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in case of felony." (3)

Of larceny by breach of trust.

By 4. Geo. 3. c. 2. s. 53, householders must give an account of their lodgers on pain of 5s.

Kely. 24, 81.

Show. 50, 57.

For indictment on this statute, vide Cro. Cir. Com. 339.

(3) A wife cannot be found guilty with her husband upon this statute, for she is under his coercion. O. B. 1783, No. 30. Nor without her husband, if it should appear that the lodgings were let to him. O. B. 1761, No. 17. Nor even if it should appear that the lodgings were let jointly to both the husband and wife, for it shall be construed to be the act of the husband only. O. B. 1758, No. 105. The offender must be a lodger at the time the larceny is committed. O. B. 1735, No. 74. The indictment also must set forth the name of the person by whom the lodgings were let. O. B. 1744, No. 747. And the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken.

Stat. 11. It is recited by 21 Hen. 8. c. 7. "That before the time of the said statute, divers, as well noblemen, as other the king's subjects, had, upon confidence and trust, delivered unto their servants their caskets, and other jewels, money, goods and chattels, safely to keep, to the use of the said masters or mistresses, and after such delivery the said servants had withdrawn themselves, and gone away from their said masters or mistresses, with the said caskets, jewels, money, goods and chattels, or part thereof, to the intent to steal the same, and defraud their said masters or mistresses thereof, and sometime being with their said masters or mistresses, had converted the said jewels, money, and other chattels, or part thereof, to their own use, which misbehaviour so done, was doubtful in the common law, whether it were felony or not; and by reason thereof the afore said servants had been in great boldness to commit such or the like offences." And thereupon it is enacted, "That all and singular such servants, (being of the age of eighteen years, and not apprentices) to whom any such caskets, jewels, money, goods or chattels, by his or their said masters or mistresses shall from thenceforth so be delivered to keep, that if any such servant or servants withdraw him or them from their said masters or mistresses, and go away with the said caskets, jewels, money, goods or chattels, or any part thereof, to the intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put, by his or their said masters or mistresses, or else being in the service of his said master or mistress, without assent or commandment of his master or mistress he imbezil the same caskets, jewels, money, goods or chattels, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it, That if the said caskets, jewels, money, goods, or chattels, that any such servant shall so go away with, or which he shall imbezil with purpose to steal it, as is afore said, be of the value of 40s. or above, That then the same false, fraudulent and untrue act and demeanour, from thenceforth, shall be deemed and adjudged felony, &c."

See 1 Hale, 667, 668.

Dalt. c. 102.
Summary 63.

Stat. 12. In the construction of this statute the following opinions have been holden: First, That it extends only to such as were servants to the owner of the goods, both at the time when they were delivered, and also at the time when they were stolen.

Dyer 5.
Sum. 62, 63.
3 Inst. 105.
Dalt. c. 102.

Stat. 13. Secondly, That it is strictly confined to such goods as are delivered to keep, and therefore that a receiver, who having received his master's rents, runs away with them; or a servant, who being intrusted to sell goods, or to receive money due on a bond, sells the goods, &c. and departs with the money, is not within the statute; but that a servant, who
receives

receives his master's goods from another servant to keep for the master, is as much guilty as if he had received them from the master's own hands, because such a delivery is looked upon as a delivery by the master.

Sec. 14. Thirdly, That it includes not the wasting or consuming of goods, howsoever wilful it may be; nor the taking away of an obligation, or any other *bare chose in action*. Summary 63.
Dalt. c. 102.
Dyer 5.

Sec. 15. Fourthly, That it extends not to the taking of such things whereof the actual property is not in the master at the time. Therefore, if a servant having money, or corn, &c. delivered to him, melt down the money of his own head, without the command of his master, into a piece of plate, or turn the corn into malt, and then run away with them, he is not within the statute; because the property of these things is so far changed, by altering them in such a manner, that they cannot be known again, and the master cannot afterwards take them without a trespass. But it is agreed, That if a servant make a suit of cloaths of cloth, or a pair of shoes of leather, delivered to him by the master, and then run away with them, he is within the statute; because the property is no way altered. And even in the first case, whether the *very taking* of the plate or malt, be within the statute or not, yet I can see no reason, why the whole act of the servant taken together, should not be looked upon as a conversion of the master's goods to his own use, with an intent to steal them, which brings it within the express letter of the statute: It has been resolved, That a servant who changes his master's money from silver to gold, and then runs away with it, &c. is within the statute; and I can see no good distinction between that and the present case. 5 H. 7. 16.
Crom. 50.
Dalt. c. 102.

Sec. 16. The benefit of clergy was taken away from all felonies within this statute, by 27 Hen. 8. c. 17. and restored by 1 Edw. 6. c. 12.—But it is enacted by 12 Ann. Stat. 1. c. 7. “that whosoever shall feloniously steal to the value of 40 s. or more, being in any dwelling-house, or out-house, thereto belonging, or shall aid or assist to commit any such offence, shall be absolutely debarred of the benefit of clergy.—But this act shall not extend to apprentices under the age of fifteen years, who shall rob their masters as aforesaid.” See Crom. 50.
Dalt. c. 102.

† *Sec. 17.* To the twoforegoing larcenies, *by breach of trust*, by lodgers and *menial* servants, the legislature has added two others, *viz.* By officers or servants employed to transact the business of the bank of England; and by officers, or servants employed in the post-office. As to servants employed by the BANK OF ENGLAND, it is enacted by 15 Geo. 2. c. 13. s. 12. “That if any officer or servant of the bank of England, being intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects belonging to the said Company, or having any bill, dividend warrant, bond, deed, or any security or effects of any other person lodged or deposited” Vide the law of larceny as to the servants of private Bankers explained in Sessions paper O. P. p. 1294. and ante p. 136.

“ deposited with the said company, or with him as an officer
 “ or servant of the said company, shall secrete, imbezle, or run
 “ away with the same, or with any part thereof he shall suffer
 “ death without benefit of clergy.”

Vide the trial
 of John Mills
 O. B. 1785, No.
 253, convicted
 upon this
 statute.

† As to servants employed by the POST-OFFICE, it is enacted by 5 Geo. 3. c. 25. s. 17. and 7 Geo. 3. c. 50. “ That
 “ if any deputy, clerk, agent, letter-carrier, post-boy or rider,
 “ or any other officer or person whatsoever employed in receiving, stamping, sorting, charging, carrying, conveying
 “ or delivering letters or packets, or in any other business relating to the post office, shall secrete, embezle, or destroy any
 “ letter, packet or bag of letters, which he shall be intrusted
 “ with, or which shall have come to his possession, containing
 “ any bank note, bank post bill, bill of exchange, exchequer
 “ bill, South Sea, or East India bond, dividend warrant, navy
 “ or victualling or transport bill, ordnance debenture, seaman’s
 “ ticket, state lottery ticket or certificate, bank receipt for
 “ payment on any loan, note of assignment of stock in the
 “ funds, letter of attorney for receiving annuity or dividends,
 “ or for selling stock in the funds, or belonging to any company,
 “ society or corporation, or of the Bank, South Sea,
 “ East India or any other company or society or corporation,
 “ American provincial bill of credit, goldsmiths or bankers
 “ letter of credit, or note for or relating to the payment of
 “ money or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of the money, or
 “ shall steal and take any of the same out of any letter or
 “ packet that shall come to his possession, he shall suffer death
 “ without clergy.” (4)

(4) In an indictment on this statute, the offender was charged in the first and third counts, as, “ A clerk employed in *charging and sorting* letters. &c.” In the second and fourth counts, as, “ A person employed in the business relating to the general post-office.” It appeared in evidence that he was only a *sorter* and not a *charger* of letters; and the jury, therefore, by the direction of the Court, found a verdict upon the second and fourth counts only. In arrest of judgment it was moved, that the jury having acquitted him on the counts which charged him as “ a *sorter* and “ *charger*,” and as he did not appear to be “ a person employed by the post-office in *any other business* but that of *sorting*, which is one of the employments particularly specified in the statute, he could not be convicted, and eleven judges unanimously agreed that judgment should be arrested for the cause above alledged; but they inclined to think the jury might have convicted the prisoner on the first and third counts, by a special finding that he was a *sorter* only. Rex. v. Shaw. 2 Black. 789.

† By Jac. 1. c. 7. and 17 Geo. 3. c. 56. “ Persons employed in the hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, silk, or dying manufacture, who shall embezle or clandestinely dye any of the materials with which they are intrusted, and any person who shall knowingly buy, sell, pawn, or dispose of the same, are liable to be punished by fine, whipping, and imprisonment.”

Sec. 18. As to the second particular, viz. What shall be said to be such a carrying away of the thing stolen, as will bring the case within the word *asportavit*; which is necessary in every indictment of larceny. It seems that any the least

† Inst. 108.
 8 Vent. 215.

removing of the thing taken from the place where it was before, is sufficient for this purpose, though it be not quite carried off; and upon this ground the guest, who, having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So also was he who having taken a horse in a close with an intent to steal him, was apprehended before he could get him out of the close: Neither is he less guilty who pulls off the wool from another's sheep, or (a) strips their skins, with an intent to steal them; or he who intended to steal plate takes it out of a trunk wherein it was, and lays it on the floor, and is surprized before he can carry it off. (5)

7 Aff. 39.
S. P. C. 26.
B. Cor. 107.
3 Inst. 109.
1 Hale 508.
Duff. 21.
Crom. 36.
O. B. Sess. 1784,
No. 537.
Dalt. p. 501.
Kely. 31.
(a) Rex. v. Mar-
tyn, Lent Ass. for
Northampton,
1777.

(5) A man was detected in taking the contents of a bale of goods in a waggon. It appeared that the bale laid horizontally, and that he had set it on its end; but as it had not been removed from the *spot*, this was held, upon a case reserved, not to be a sufficient carrying away. But where a man, with a felonious intention, had removed goods from the head to the tail of a waggon, it was held a sufficient removal to constitute a carrying away. O. B. 1784, p. 734. So a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was held to be a sufficient asportation. O. B. 1784, No. 537.

Sec. 19. As to the third particular, *viz.* By whom larceny may be committed,—It is certain that a *feme covert* may be guilty thereof by stealing the goods of a stranger, but not by stealing her husband's, because a husband and wife are considered but as one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife; as he may by taking away the wife by force and against her will, together with the goods of the husband.

Sup. c. 1.
f. 9, 10, 11.
1 Hale 514, 515,
516, 637, 638.
Pult. 127.
Sum. 65.
B. Cor. 14, 77.
Dalt. c. 104.
13 Aff. 5.
18 Ed. 3. 32.
S. P. C. 94.
Crom. 35.
See Proverbs c. 6.
v. 30.
Grot. de Jure, b. 2.
c. 2. f. 6, 7.
Murr. c. 4.

Puffend. b. 2. c. 6. Britton, c. 10.

Sec. 20. It is said to be no felony for one reduced to extreme necessity, to take so much of another's victuals as will save him from starving; but if such his necessity be owing to his unthriftiness, surely it is far from being any excuse. (6)

(6) A judge ought to be tender in such cases, and use much discretion and moderation. 1 Hale 565. But it seems to be an unwarranted doctrine, borrowed from the notions of some civilians; at least it is now antiquated, the law of England admitting no such excuse at present. 4 Comm. 31. 1 Hale, 54.

Sec. 21. As to the fourth particular, *viz.* What are such goods, the stealing whereof may amount to felony, the following particulars are to be observed.—First, they ought to be no way annexed to the freehold. And therefore it is no larceny, but a bare trespass, to steal corn or grafts, growing, or apples on a tree, or lead on a church or house, but it is larceny to take them being severed from the freehold, whether by the owner, or even by the thief himself, if he sever them at one time, and then come again at another time and take them.—

1 Hale, 509,
512.
12 Aff. 32.
B. Cor. 76.
1 Mod. 89.
Sum. 67.
Allen 81.
3 Inst. 109.
2 Keb. 515.

And

1 Vent. 187.
Crom. 37.
18 H. 8. 2.
S. P. C. 25.
Strange 1137.
2 Comm. 16.

And the general reason of this distinction (7) between chattels fixed to a freehold and those lying loose, perhaps may be this; because the former, not being to be removed without trouble and difficulty, are not so liable to be stolen, and therefore need not to be secured by so severe laws as the other require.

(7) For an explanation of the principle upon which this distinction is founded, vide 4 Comm. 233. 2 Bac. Abr. 470.—But many of the descriptions of property which come within this notion of an adherence to the freehold, being thereby placed in a situation extremely precarious and unprotected, the legislature has from time to time imposed various penalties upon the stealing, injuring, or destroying of them. For an account of which vide appendix the first, chapter fifty-eight, under the title “Offences to property adherent to the freehold.”

Sum. 66, 67.
Strange 1133.
Sess. Caf. 378.
3 Inst. 109.

B. Cor. 155.
S. P. C. 25.
Crom. 27.
3 Rep. 33.
4 Comm. 234.

Stra. 1136.

Sec. 22. Secondly, They ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or other *chose* in action. And the reason wherefore there can be no felony in taking away any such thing seems to be, because, generally speaking, they being of no manner of use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner as those things which are of a known price, and every body's money; and for the like reason it is no felony to take away a villein, or an infant in ward, &c.

Made perpetual
by 9 Geo. 2.
c. 18.

† But it is now enacted by 2 Geo. 2. c. 25. f. 3. “That whoever shall steal or take by robbery, any exchequer orders or tallies, or other orders intitling any other person to any annuity or share in any parliamentary fund, or any exchequer bills, bank notes, South Sea bonds, East-India bonds, dividend warrants of the Bank, South Sea company, East-India company, or any other company, society or corporation; bills of exchange, navy bills or debentures, goldsmiths notes for the payment of money, or other bonds or warrants, bills, or promissory notes for the payment of any money being the property of any other person or of any corporation, notwithstanding any of the said particulars are termed in law a *chose in action*, shall be deemed guilty of felony of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been, if the offender had stolen or taken by robbery, any other goods of like value with the money due on such orders, tallies, bills, bonds, warrants, debentures or notes, or secured thereby, and remaining unsatisfied, and such offender shall suffer such punishment as if he had stolen other goods of the like value, with the monies due on such orders, tallies, bonds, bills, warrants, debentures or notes respectively, or secured thereby, and remaining unsatisfied.”

Vide O. B. 1785,
No. 253.

† It is also further enacted by 5 Geo. 3. c. 25. f. 17. and by 7 Geo. 3. c. 50. f. 2. “That whoever shall rob any mail in
“ which

" which letters are sent or conveyed by the post, of any letter, packet, or bag of letters, or shall steal and take from any such mail, or from any bag of letters sent or conveyed by the post, or from or out of any post-office, or house or place for the receipt or delivery of letters or packets sent, or to be sent by the post, any letter or packet, although such robbery, stealing, or taking shall not appear or be proved to be a taking from the person, or upon the king's highway, or to be a robbery committed in any dwelling house or any coach house, stable, barn, or any out-house belonging to a dwelling house; and although it should not appear that any persons were put in fear by such robbery, stealing, or taking, yet such offenders shall be deemed guilty of felony, and suffer death without the benefit of clergy."

Sec. 23. Thirdly, They ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, howsoever they may be valued by the owner, shall never be so highly regarded by the law, that for their sakes a man shall die; as he may for stealing a hawk, known by him to be reclaimed, not only by force of the statute of 37 *Edw.* 3. 19. but also at common law, in respect of that very high value which was formerly set upon that bird.

Sum. 66.
3 Inst. 109.
7 Co. 18.
3 H. 8. 3.
Crom. 36.
Dalt. c. 103.
2 Comm. 393.
1 Hale 512.

† But it is recited by the 10 *Geo.* 3. c. 18. " That the practice of stealing dogs hath of late years greatly increased," and it is therefore enacted, " That if any person shall steal any dog or dogs of any kind or sort whatsoever from the owner thereof, or from any person entrusted by the owner therewith, or shall knowingly sell, buy, receive, harbour, keep or detain any such dog or dogs, on conviction by one witness, or on confession, before two justices, they shall forfeit, for the first offence, not exceeding 30*l.* nor less than 20*l.* together with the charges previous to and attending such conviction; on default to be committed to the house of correction for not more than twelve, nor less than six months, unless the penalty be sooner paid." For the second offence, not exceeding 50*l.* nor less than 30*l.* and from twelve to eighteen months imprisonment, &c. One justice, on information, may grant a warrant to search, &c. and if any such dog, or the skin of such dog, be found, the possessor, if privy, &c. is liable to the penalties aforesaid. On fourteen days notice, and entering into a recognizance, persons aggrieved may appeal to the Quarter Sessions, but no certiorari shall be allowed. (8)

(8) Mr. Burn has pointed out several inaccuracies in this statute, and doubts very much whether from the special wording of it, it is penal to steal a bitch. 1 Vol. 497. It is also said, that the particular sort of dog stolen must be described. *Add'ing* P. 5. 221.

Sec. 24. As to the fifth particular, *viz.* How far the goods taken away ought to belong to another. It seems agreed, See 1 Hale 512 to 515. That the taking of goods whereof no one had a property at B. Cor. 190. the

the time, cannot be felony; and therefore, That he who takes away treasure-trove, or a wreck, (9) waif, or stray, before they have been seized by the persons who have a right thereto, is not guilty of felony, and shall be only punished by fine, &c.

(9) For offences by statute in taking treasure-trove, or robbing a wreck, vide appendix 2. c. 58.

Self. 25. Neither shall he who takes a fish in a river or other great water, wherein they are at their natural liberty, be guilty of felony, as he may be who takes them out of a trunk or pond, &c. (10)

vide c. 58, appendix the third. Fost. 366. 1 Hale 511.

Self. 26. Upon the like ground it seems clear, That a man cannot commit felony by taking deer, hares, or conies, in a forest, chase, or warren, or old pigeons being out of the house, &c. But it is agreed, That one may commit larceny in taking such or any other creatures *fera natura*, if they be fit for food, and reduced to tameness, and known by him to be so; and it seems the most plausible opinion, That it is felony to steal wild pigeons in a dove-house shut up, or hares or deer (11) in a house, or even in a park, inclosed in such a manner that the owner may take them whenever he pleases, without the least danger of their escaping, in which case they are as much in his power as fish in a pond, or young pigeons, or hawks in a nest, &c. in taking of which, for the like reason, it seems to be agreed, that felony may be committed.

(11) For the offences created by statute in taking or annoying deer, and hares, vide post. chap. 49 title "offences by hunters."

Self. 27. Also it seems clear, That one may commit felony by taking away swans marked or pinioned, or those which are unmarked, if they be kept in a pond or private river; neither do I see why it is not as much felony to steal the eggs of such swans or hawks, as it is to steal their young ones, unless it be because 11 Hen. 7. c. 17. has appointed a less punishment for this offence.

Summary 68. 1 Hale 511. 7 Co. 17, 18. Dalt. c. 103. 3 Inst. 98, 109. By 31 Hen. 8. c. 12. it is felony to take hawks eggs out of any nests in the king's lands. This is repealed by the general words of 1 Mary, c. 1.

Self. 28. However, there is no doubt but that the taking of domestick beasts, as horses, mares, colts, &c. or of any creatures whatsoever, which are *domitæ naturæ*, and fit for food, as ducks, hens, geese, turkeys, peacocks, or their eggs, or young ones, may be felony.

Self. 29. Also it is said, That there may be felony in taking goods the owner whereof is unknown, in which case the king shall have the goods, and the offender shall be indicted for taking *bona cujusdam hominis ignoti*. And it seems, That in some cases the law will rather feign a property, where in strictness there is none, than suffer an offender to escape.

And

Vide 2 Hale. 290. S. P. C. 25. 96. Dyer 99. Dalt. c. 103. Sum. 67. B. 2. c. 23. f. 78.

Therefore it is said, That he who takes away the goods of a house, or abbey, in time of vacation, may be indicted, in a special case, for stealing *bona capellæ*, being in the custody of a vicar or such; and in the second, for stealing *bona domus* &c. & *a fortiori*, therefore it follows, That he who takes away the goods belonging to a parish-church, may be indicted for stealing *bona parochianorum*. And it hath been adjudged, That he who takes off a shroud (a) from a dead corpse, may be indicted as having stolen it from him who was the owner thereof; for a dead man can have no property.

7 Ed. 4. 14, 15.
S. P. C. 95.
Dalt. c. 103.
3 Inst. 110.
B. Indict. 33.
C. Eliz. 145. 179.
1 Hale 512.
(a) 3 Inst. 110.
12 Co. 113.
Dalt. c. 103.
1 Hale 515.
It is said, 2 Hale
290. and 8 Mod.
249. that a pro-
perty must be
of not guilty.

Somebody at the trial, or it shall be presumed in the prisoner from his plea, O. B. 1785. p. 782. and Appendix first, Sect. 13. in notis.

30. And there is a special case wherein it is said, that a man may commit larceny by taking of things, whereof a great part of the property is in himself; as if A. (b) deliver goods to B. a taylor or carrier, &c. and afterwards, with an intent to defraud him in answer for them, fraudulently and secretly take them from him; for B. had a special kind of property in the goods so delivered to him, in respect whereof, if a stranger (c) had stolen them, he might have been indicted generally as having stolen goods, and the injury is altogether as great, and the fraud, where they are taken away by the very owner.

(b) 7 H. 6. 43.
5 H. 7. 18.
B. Cor. 45. 160.
C. Eliz. 336.
8 P. C. 26. 3 Inst.
110. Dalt. c.
103. (c) Sum.
c. 67.
Kellw. 70. O.
B. 1785. 239.

31. As to the sixth point, viz. of what value the goods must be; if they be but of the value of 12 d. or under, the offence can be but petit larceny.

22 Aff. 39.
1 Hale C. 530.
B. Cor. 84. 85.
S. P. C. 24.
2 Roll. 78. Dalt.
c. 101. 2 Inst. 189. Kely. 68. Sum. 69, 70. 4 Com. 238. 1 Hale 12. 3 Inst. 53.

32. Yet if two persons, or more, together, steal goods the value of twelve pence, every one of them is guilty of grand larceny, for each person is as much an offender as if he acted alone.

8. P. C. 24.
Dalt. c. 101.
Sum. 70. Crom.
36. Prin. P. L.
292.

33. Also it seems the current opinion of all the old lawyers, That if one at several times steal several parcels of goods, under the value of twelve pence, but amounting in the whole to more, from the same person, and be found guilty thereof by the same indictment, he shall have judgment of death as in grand larceny; but this severity is seldom practised. (12)

S. P. C. 24.
1 Hale 531.
Crom. 36.
Dalt. c. 101.
Summary 70.
2 Keb. 719.

The value of the property stolen, must not only be, in the whole, of such an amount as the law requires to constitute a capital offence; but the stealing must be to that amount at one and the same par-
ticular time. For the law will not permit things stolen at different times, which are, in fact, distinct offences, to be added together; and as no number of petit larcenies will amount to a grand larceny, so no number of grand larcenies will amount to a capital offence. O. B. 1784. p. 206.

In what cases simple larceny is excluded from the benefit of the clergy will be shewn hereafter in the second book, in the chapter concerning clergy. (13)

(13) In horse-stealing, principal and accessory, 1 Ed. 4. c. 12. 2 & 3 Ed. 6. c. 33. 31 Eliz. c. 12. In stealing woollens from the tenters, 22 Car. 2. c. 5. 15 Geo. 2. c. 27. or from the loom, 12 Geo. 1. c. 34. Linen from the bleachers, 4 Geo. 2. c. 16. 18 Geo. 2. c. 27. but the judge may transport for 14 years. Cattle, 14 Geo. 2. c. 6. 15 Geo. 2. c. 34. On navigable rivers above 40s. 24 Geo. 2. c. 45. From vessels wrecked or in distress, 12 Ann. c. 18. 26 Geo. 2. c. 19. Letters by post, 7 Geo. 3. c. 50. Deer, hare, and conies, and fish, being armed and disguised, 9 Geo. 1. c. 22. Privately from the person above 12d. 8 Eliz. c. 4. women. 3 Hen. 7. c. 2. 39 Eliz. c. 9. Secreting, embesiling, or destroying bank notes, 15 Geo. 2. c. 13. 31 Geo. 2. c. 42. Black lead, 25 Geo. 2. c. 10. Naval stores. 22 Car. 2. c. 5. Vide Ante, p. 75. f. 18. Stealing from booth or tent, 5 and 6 Edw. 6. c. 9.

Summary 69.
1 Hale 503.

Self. 34. And now we are come to petit larceny, which seems to agree with grand larceny in all the particulars above-mentioned, except only the value of the goods; so that wherever an offence would amount to grand larceny, if the thing stolen were above the value of twelve pence, it is petit larceny, if it be but of that value, or under.

Foster 73.

B. Cor. 84.
184. S. P. C. 24.
Dalt. c. 101.
Crom. 36.
Hetley 66.
7 H. 8. 23.

Self. 35. And if one be indicted for stealing goods to the value of ten shillings, and the jury find specially that he is guilty but that the goods are worth but ten pence, he shall not have judgment of death, but only as for petit larceny.

B. Cor. 2. 219.
1 Hale 530.
3 Inst. 218.
App. 72. 143.
Summary 70.
Con. S. P. C. 24.
Dalt. c. 101.

Self. 36. It seems that all petit larceny is felony, and consequently requires the word *felonice*, in an indictment for it. Yet it is certain, That it is not punished with the loss of life, or lands, but only with the forfeiture of goods and chattels, and whipping, or other corporal punishment.

Vide, also, 16
Geo. 2. c. 15.
8 Geo. 3. c. 15.
19 Geo. 3. c. 74.
24 Geo. 3. c. 56.
respecting the
transportation of
offenders. B 2.
c. 33. f. 135. &c.

Self. 37. † But it is enacted by 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. "That where any person or persons shall be convicted of grand or petit larceny, &c. who by the law shall be intitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, it shall and may be lawful for the court before whom they are convicted, or any court held, at the same or any other place, with the like authority, if they think fit, to order such offenders to be transported for the space of seven years."

N. B. There are no accessories in petit larceny; therefore if two be indicted, one for privately stealing from the person a handkerchief to the value of 12d. and another for receiving it, and the principal be found guilty value 10d. only, the accessory ought to be discharged. Foster 73.

CHAPTER THE THIRTY-FOURTH.

OF ROBBERY.

MIXT or complicated larceny is such as hath a farther degree of guilt in it, as being a taking from the Person of a man, or from his House. Prin. P. L. 287.

Larceny from the person of a man either puts him in fear, and then it is called robbery; or does not put him in fear, and then it is called barely, Larceny from the person.

ROBBERY is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear, Summary 71.
3 Inst. 68.
1 Hale 531.

In the explication whereof, I shall consider the following particulars:—First, What taking away will satisfy the word *cepi* in an indictment for this offence. Secondly, What shall be said to be a taking away from the person. Thirdly, What kind of taking shall be said to be violent. Fourthly, In what respects robbery differs from other larcenies.

Sec. 1. As to the first point, viz. What taking away will satisfy the word *cepi* in an indictment for robbery; it seems clear, That he who receives my money by my delivery, either whilst I am under the terror of his assault, or afterwards while I think myself bound in conscience to give it to him by an oath to that purpose, which in my fear I was compelled by him to take, may in the eye of the law, as properly be said to take it from me, as he who actually takes it out of my pocket with his own hands. Summary 72.
44 E. 3. 14.
4 H. 4. 3.
Dalt. c. 100.
S. P. C. 27.
Crompton 34.
3 Inst. 68.
F. Cor. 464.
O. B. 1784.
P. 296.

Sec. 2. Neither can he who has once actually compleated the offence, by taking my goods in such a manner into his possession, afterwards purge it by any re-delivery. † The outrage offered to the rights of society doth not vary in its nature, because ineffectual in its consequences (a). Therefore where a robber, having taken a purse, returned it again, saying, “If you value your purse, take it and give me the contents;” but was seized before the money was re-delivered, he was found guilty (b), for the continuance of the property in the possession of the robber is not required by law (c). 3 Inst. 60.
Summary 70.
(a) Prin. P. L: 286.
(b) O. B. 1781.
No. 1.
(c) 3 Inst. 69.

Sec. 3. But he who only attacks me in order to rob me, but does not take my goods into his possession, though he go so far S. P. C. 27.
Crompt. 34.
3 Inst. 69.
Dalt. c. 100.
Sum. 71. 72.
1 Hale 531.

(a) Page 250,
251.

(b) Vide 17 G.
2. c. 5. page
570.

1 Hale 533.
534. 537.
1 And. 176.
Purley's case.
Crom. 34.
Dalt. c. 100.
Summary 72.
R. 2. c. 29.
i. 8.

B. P. C. 27.
Crom 34. 35.
Dalt. c. 100.
5 Inst. 69.
Summary 73.
1 Hale 533.
Stylles 156.
Salk. 613.
Carth. 145.
B. R. H. 107.
Strange 1015.
Douglass 197.
Comyns 478.

far as to cut off the girdle of my purse, by reason whereof it falls to the ground, is not guilty of robbery; but highly punishable at the common law by fine and imprisonment, &c. for, so enormous a breach of the peace.—† This punishment however not proving sufficient to deter offenders, it is made a felony by 7 Geo. 2. c. 21. “to assault another with an intention to rob him,” for which I shall refer to Appendix the fourteenth (a) And to crush the offence in its earliest stage, it is enacted by 23 Geo. 3. c. 88, “that whoever shall be apprehended, and any pistol, hanger, cutlass, bludgeon, or other offensive weapon shall be found upon him, with intent feloniously to assault any person, he shall be deemed and punished “as a rogue and vagabond.” (b)

Sett. 4. Yet in some cases a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several of one gang, and one of them only takes my money, in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another, through the hopes of mutual assistance in their enterprises: Nay though they miss of the first, intended prize, and one of them afterwards ride from the rest and rob a third person in the same highway, without their knowledge, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing.

Sett. 5. As to the second point, viz. What shall be said to be a taking away from the person. Not only the taking away a horse from a man whereon he is actually riding, or money out of his pocket, but also the taking of any thing from him openly and before his face, which is under his immediate and personal care and protection, may properly enough be said to be a taking from the person. And therefore he who having first assaulted me takes away my horse standing by me, or having put me in fear, drives my cattle in my presence out of my pasture, or takes up purse which in my fright I cast into a bush, or my hat which fell from my head, or robs my servant of my money before my face, may be indicted as having taken such things from my person. (1)

(1) Fear is the distinguishing ingredient between robbery and other larcenies. 3 Inst. 68. Therefore where a thief clandestinely stole a purse; and, on its being discovered in his custody, denounced vengeance against the party if he spoke of it, and then rode away; it was held to be simple larceny only, and not robbery; because the fear, excited by the menaces of the thief, was subsequent to the act of taking the purse. 2 Roll. 154. 1 Hale 535. So where several men find another apparently intoxicated, and swearing he shall go home, they drag, abuse, kick him, and clandestinely take his money, this is no robbery; for no demand is made of money, nor any fear excited for the purpose of obtaining it. Q. B. 1784. p. 797.

Sett.

SECT. 6. As to the third point, *viz.* What kind of taking shall be said to be violent. Wherever a person assaults another with such circumstances of terror as put him into fear, and causes him by reason of such fear to part with his money, the taking thereof is adjudged robbery, whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him. (4)

(4) But it is not necessary that the fact of actual fear should either be laid in the indictment, or be proved upon the trial. It is sufficient if the offence be charged to be done *volenter et contra voluntatem*. And if it appear upon the evidence to have been attended with those circumstances of violence or terror, which in common experience are likely to induce a man to part with his property against his consent, either for the safety of his person, or for the preservation of his character and good name, it will amount to a robbery. *Foster* 128. 4 *Comm.* 242. *Donally's case*. O. B. 1778. p. 197. O. B. 1784. p. 71. 296. 873. — Accordingly, to snatch a basket of linen suddenly from the head of another. O. B. 1782. No. 483. *sed vide contra*. O. B. 1784. p. 71. or to pull an earring from the ear of a lady; O. B. 1784. No. 662. or if an officer feloniously take money from a prisoner not to take her to goal, under colour of authority, &c. O. B. 1784. p. 295. *Ray*. 297. *Dalt.* 489. without in either case having made any express demand, have been ruled sufficient *acts of violence* to constitute the crime of robbery. *Prin.* P. L. 286. — And to obtain property, by threatening to accuse another of having been guilty of an unnatural crime, has been held upon the solemn opinion of all the judges, to be an act sufficient to raise, in the mind of the party menaced, such a terror and apprehension of mischief as to constitute the offence by *putting in fear*; O. B. 1784. p. 296. O. B. 1786. p. 522. for the law in *odium spoliatoris* will presume fear where there appears to be no just ground for it. *Foster* 129. *Prin.* P. L. 287. *Ante*. Sect. 1.

SECT. 7. And some have gone so far as to hold, That if a man, meeting another going with his goods to market in order to sell them, compel him to sell them to him against his will, he is guilty of robbery, though he give for them more than they are worth: But perhaps this opinion is too severe, because the grievance to the party seems rather to proceed from the perverseness of his humour, than from any real injury done to him; and there seems to be no such enormity in the intention of the wrong-doer, as is implied in the notion of felony.

SECT. 8. However it is certain, That the claim of property, in the thing taken away, without any colour, is no manner of excuse.

SECT. 9. As to the fourth point, *viz.* In what respects robbery differs from other larcenies. — First, No other larceny shall have judgment of death, unless the thing stolen be above the value of twelve pence; but robbery shall have such judgment, how small soever the value may be of the thing taken away.

SECT. 10. Secondly, Other larcenies whether from the person or not, shall not be supposed to be done with violence or terror, but robbery is always laid as done on an assault with violence, and putting the party in fear, (a) which is properly thus expressed

expressed in an indictment, *a persona J. S. violentæ, & felonice cepit & asportavit in magnum prædicti J. S. terrorem.*

SECT. 11. Thirdly, But they all agree in this, That the offenders had the benefit of the clergy at the common law. But many of them are at this day excluded in many cases by statute; for which see the chapter in the second book concerning clergy. (5)

(5) Principals and accessaries before the fact, in this species of larceny, are debarred of clergy by 23 Hen. 8. c. 1. and accessaries after, by 4 Phil. & M. c. 4. if committed in or near about the highways. Moor, 16. 1 Hale, 535. But by 3 & 4 Will. & M. c. 9. it is ousted of clergy generally, 4 Comm. 243. The words of the 23 Hen. 8. however, are pursued in indictments for this offence. By 4 Will. & Mar. c. 8. a reward of 40l. is given on conviction of any robbery, committed in or upon any highway, passage, field, or open place: And by 6 Geo. 1. c. 23. f. 8. the streets of London, Westminster, and other places, are deemed highways within the meaning of 4 Will. & Mar. c. 8.—For the reward of ten pounds and proceedings against the hundred, see 8 Geo. 2. c. 16. 22 Geo. 2. c. 24.

CHAPTER THE THIRTY-FIFTH.

OF LARCENY FROM THE PERSON.

Dyer, 224.
2 Roll. 154.
Crom. 34.
Dalt. c. 100.
Raym. 275.
276.

LARCENY from the person of a man without putting him in fear, is either done privily without his knowledge, (in which case it is excluded from the benefit of the clergy by 8 Eliz. c. 4.) or openly and avowedly before his face; as if one take off my hat from my head, and run away with it, or come into my shop and cheapen goods, and run away with them without paying for them, which is agreed not to be robbery, and as it seems, is more properly indictable as a trespass than felony, unless the offender were either unknown, or immediately fled the country if he were known; otherwise I have a remedy against him in the ordinary course of civil justice; and it seems rigorous to make such offences capital, which probably may sufficiently be provided against by more gentle methods. (1)

(1) The case in Dyer 224. was an indictment *quod vi et armis apud B. in via regia ibidem 40s. in pecuniis numerat, &c.* and the judgment was, that it is not robbery if the person is not put in fear as by assault and violence.—The case in Roll's Reports is where the fear was excited subsequent to the taking, and therefore only larceny. The case in Raymond, of running away with goods, after having obtained the delivery, upon pretence of purchasing them, is expressly decided to be felony. And Dalton from Crompton only says the tortious taking of another's goods without a title so to do, is but a trespass. These references therefore by no means prove that the offences mentioned are not felonies, if committed with a felonious intent.—Vide Hale's Summary, 73; 74; 75. Kely. 43, 70. 1 Sid. 254.

SECT. 2. However it is certain, That all open larcenies from the person are within the benefit of the clergy, except such as are committed in a dwelling-house, &c. to the value of forty shillings, from which it is taken away by 12 Ann. c. 7—

Sec. 3. Also a private larceny from the person shall have the benefit of the clergy, unless it be laid in the indictment as done *clam* and *secrete*, &c. in exact pursuance of the words of 8 Eliz. c. 4. 1 Hale 529.

Sec. 4. And no such larceny shall have judgment of death, but only as of petit larceny, if the jury find the offender guilty under the value of twelve pence; for the statute does not alter the nature of the offence, or make that capital which was not so before, but only leaves the offender to the judgment of the common law. Summary 75.
Dalt. c. 100.
Prin. P. L. 292
2 Hale 366.
Foster 73.

CHAPTER THE THIRTY-SIXTH.

OF LARCENY FROM THE HOUSE.

THE other branch of complicated larceny, is that which is from the habitation of a man, which though it seem to have a higher degree of guilt than simple larceny, yet I do not find it distinguished from it by *the common law*, either as to the circumstances above mentioned, which are requisite to constitute the offence, or as to the punishment. Summary 76.
O. B. 1784. No.
233. & p. 1217.
4 Comm. 240.
Prin. P. L. 289.

However it is at this day excluded from the benefit of the clergy in many cases by several acts of parliament, which I shall particularly consider in the second book in the chapter concerning clergy. (1) Bar. Off. 375.

(1) First, In all larcenies *above the value of twelve-pence* committed 1st, in a church or chapel, with or without violence, or breaking the same, by 23 Hen. 8. c. 1. 25 Hen. 8. c. 3. 1 Edw. 6. c. 12. 5 & 6 Edw. 6. c. 9. & 10. — 2d. In a booth or tent in a market or fair, in the day time or in the night, by violence, or breaking the same, the owner or some of his family being therein, 5 & 6 Edw. 6. c. 9. — 3d. In a dwelling-house by day, by breaking the same, any person being therein, 3 & 4 Will. & Mar. c. 9. — 4th. In a dwelling-house by day, without breaking the same, any person being therein and put in fear, 3 & 4 Will. & Mar. c. 9. — 5th. In a dwelling-house by night, without breaking the same, the owner or some of his family being therein, and put in fear, 23 Hen. 8. c. 1. — Secondly, In all larcenies *to the value of five shillings*, committed, 1st. By breaking any dwelling-house, or any out house, shop, or ware house thereunto belonging, in the day time, although no person be therein, 39 Eliz. c. 15. Hale 508. and 522. Kely. 31. O. B. 1785. p. 312. 827. — 2d. By stealing privately in any shop, ware-house, coach-house, or stable, by day or by night; though the same be not broke open, and though no person be therein, 10 & 11 Will. 3. c. 23. (Fost. 78. Barr. 379). Lastly, In all larcenies *to the value of forty shillings*, from a dwelling house or its out-houses without breaking in, and whether any person be therein or no. 12 Ann. c. 7.

CHAPTER THE THIRTY-SEVENTH.

O F P I R A C Y.

TO what has been said concerning such larcenies as are felonies by the common law, it may not be improper to add somewhat concerning piracy (1) and depredation at sea, which is a capital offence by the civil law.

(1) The king of England hath not only an empire and sovereignty over the British seas for the punishment of piracy, but, in concurrence with other princes and states, an undoubted jurisdiction and power in the most remote parts of the world. If any person, therefore, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we are in amity, trade, or correspondence, shall be robbed or spoiled in the narrow or other seas, whether the Mediterranean, Atlantic, Southern, or any branches thereof, either on this or the other side of the Line, it is piracy within the limits and cognizance of the Admiralty Sessions. Sir. Ch. Hodge's Charge; Old Bailey. 8 Will. 3.

40 Aff. 25.
Staunf. 10.
2 Hale 369.
S. P. C. 10.
Summary 77.
Co. Litt. 391.
3 Ink. 112.

SecT. 2. It is said, That before 25 Edw. 3. this offence was punished at common law as petit treason, if committed by a subject, and as felony, if committed by a foreigner: However it seems agreed, that after that statute by which all treason is confined to the particulars therein set down, it was cognizable only by the civil law.

5 St. Tr. 3.
8 Mod. 67, 76.
4 Comm. 71.

SecT. 3. But this proving very inconvenient, because by that law no offender shall have judgment of death, without his own confession, or direct proof by eye-witnesses, it was enacted by 28 Hen. 8. c. 15. "That all felonies and robberies, &c. upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have or pretend to have power, authority or jurisdiction, shall be inquired, tried, heard, determined and judged in such shires and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same, in like form and condition, as if any such offence or offences had been committed or done in or upon the land; and such commissions shall be had under the king's Great Seal, directed to the admiral or admirals, or to his or their lieutenant, deputy and deputies, and to three or four such other substantial persons, as shall be named or appointed by the lord chancellor of England for the time being, from time to time and as oft as need shall require, to hear and determine such offences, after the common course of the laws of this land used for felonies and robberies, &c. done and committed upon the land within this realm."

SecT. 4. And it is further enacted by the said statute, "That if any person or persons happen to be indicted for
" any

" any such offence done, or hereafter to be done, upon the
 " seas, or in any other place above limited, that then such
 " order, process, judgment and execution, shall be used, had,
 " done and made, to and against every such person and
 " persons so being indicted, as against felons, &c. for any felony,
 " &c. upon the land, by the laws of the land is accustomed."

Sect. 5. And it is farther enacted by the said statute,
 " That such as shall be convicted of any such offence by
 " verdict, confession, or process by authority of any such
 " commission, shall have and suffer such pains of death,
 " losses of lands, goods, and chattels, as if they had been
 " attainted and convicted of such offence done upon the land,
 " and also that they shall be excluded from the benefit of the
 " clergy."

Vide the chapter
 of clergy in the
 second book. a
 Hale 368, 370.
 Moor 756.

Sect. 6. In the exposition of this act it has been holden,—
 First, That it does not alter the nature of the offence so
 as to make that which was before a felony only by the
 civil law, now become a felony by the common law; for
 the offence must still be alledged as done upon the sea,
 and is no way cognizable by the common law, but only
 by virtue of this statute, which, by ordaining that in some
 respects it shall have the like trial and punishment, as are
 used for felony at common law, shall not be carried so far
 as to make it also agree with it in other particulars which are
 not mentioned. And from hence it follows, That this offence
 remains as before of a special nature, and that it shall not be
 included in a general pardon of all felonies which, as it was,
 before this statute, to be expounded of no felonies, which are
 such only by the civil law, shall continue still to have the same
 construction.

3 Inst. 112,
 113.
 Summary 77.
 C. C. C. 502.

Moor 756.
 3 Inst. 112.
 Co. Lit. 391.

Sect. 7. From the same ground also it follows, That no
 persons shall, in respect of this statute, be construed to be,
 or punished as, accessaries to piracies before or after, as
 they might have been if it been made a felony by the statute,
 whereby all those would incidently have been made access-
 aries in the like cases, in which they would have been access-
 aries to a felony at common law. And from hence it follows,
 That accessaries to piracy, being neither expressly named in
 the statute, nor by construction included in it, remain as
 they were before, and were triable by the civil law, if their
 offence were committed on the sea, but if on the land, by no
 law until 11 & 12 Will. 3. c. 7. for 2 & 3 Edw. 6. c. 24.
 which provides against accessaries in one county to a felony in
 another, extends not to accessaries to an offence committed
 in no county, but on the sea; but by the said statute of 11
 & 12

3 Inst. 112.
 Sum. 77. 215.

Yelv. 134, 138.

& 12 Will. they are triable in like manner as the principals are by the statute of 28 Hen. 8.

3 Inst. 112.
Co. Lit. 391.
Summary 77.
B. 2. c. 23.
f. 12.

Secl. 8. From the same ground also it follows, That an attainder for this offence corrupts not the blood, inasmuch as the statute only says that the offender shall suffer such pains of death, &c. as if he were attainted of a felony at common law; but says not that the blood shall be corrupted, &c. (2)

(2) If the indictment be *vi et armis et felonice*, &c. as a robbery at common law, the blood may be corrupted; for piracy upon the statute is robbery, and offenders have been so indicted in the King's Bench, and on conviction, executed. But if the indictment be *piratice depra-davit* in the style of the civil law, the attainder corrupts not the blood. And this distinction will reconcile the passages upon this subject in 3 Inst. c. 49. and Co. Lit. f. 745. Vide 1 Hale 355.

3 Inst. 114.
Dyer 241. 308.
Summary 78.

Secl. 9. Yet it has been resolved, That an offender standing mute on an arraignment by force of this statute, shall have judgment of *pain fort & dure*; for the words of the statute are, "That a commission shall be directed, &c. to hear and determine such offences after the common course of the laws of the land, &c." † But by 12 Geo. 3. c. 20. "Standing mute in piracy amounts to a conviction, and the court shall award the same judgment as on a conviction by verdict or confession."

3 Inst. 112.
S. P. C. 114.

1 Roll. 175.

Secl. 10. Secondly, It has been holden, That the indictment for this offence must alledge the fact to be done upon the sea, and must have both the words *felonice* and *piratice*: And that no offence is punishable by virtue of this act as piracy, which would not have been felony if done on the land, and consequently that the taking of an enemy's ship by an enemy, is not within the statute.

Moore 756.
1 Roll. 175.
Summary 77.
3 Inst. 113.

Secl. 11. Thirdly, It is agreed, That this statute extends not to offences done in creeks or ports within the body of a county, because they are, and always were, cognizable by the common law. † But it was doubted whether this statute of 28 Hen. 8. had not taken away the trial of these offences before the admiral or his lieutenant or commissary, which had occasioned a total disuse of such manner of trial to the encouragement of pirates, who could not be tried by this statute unless brought to England, at a great trouble and expence.

And made perpetual by 6 Geo. 1. c. 19.

Secl. 12. It is enacted therefore by 11 & 12 Will. 3. c. 7. which was continued by 1 Geo. 1. c. 25. for five years, and from thence to the end of the next sessions of parliament, "That all piracies, felonies and robberies committed in or upon the sea, or in any place where the admiral has jurisdiction, may be tried and determined at sea or upon the land, in any of his majesty's islands, or plantations, &c. to be appointed by the king's commission under the Great

" Seal."

“ Seal, or the seal of the Admiralty, directed to any of the
 “ admirals, &c. and such persons and officers by name, or for
 “ the time being, as his majesty shall think fit, who shall have
 “ power jointly or severally, by warrant under hand and
 “ seal of any of them, to commit any person against whom
 “ information of any such offences shall be given upon oath,
 “ and to call a court of Admiralty, which shall consist of
 “ seven persons at the least, and shall proceed in the trial
 “ of the said offenders, according to such directions as are
 “ set forth at large in the said statute.”

Stat. 13. And it is further enacted by the said statute,
 par. 8. “ That if any of his majesty’s natural born sub-
 “ jects or denizens of this kingdom, shall commit any piracy
 “ or robbery, or any act of hostility, against other his majes-
 “ ty’s subjects upon the sea, under colour of any commission
 “ from any foreign prince or state, or pretence of authority
 “ from any person whatsoever, such offender and offenders,
 “ and every of them, shall be deemed, adjudged, and taken
 “ to be pirates, felons and robbers; and they and every
 “ of them, being duly convicted thereof according to this act,
 “ or the aforesaid statute of king Henry the Eighth, shall have
 “ and suffer such pains of death, loss of lands, goods and chat-
 “ tels, as pirates, felons and robbers upon the seas ought to
 “ have and suffer.”

Stat. 14. And it is farther enacted by the said statute,
 “ That if any commander or master of any ship, or any sea-
 “ man or mariner, shall in any place where the admiral hath
 “ jurisdiction, betray his trust and turn pirate, enemy or rebel,
 “ and piratically and feloniously run away with his or their
 “ ship or ships, or any barge, boat, ordinance, ammunition,
 “ goods or merchandizes, or yield them up voluntarily to any
 “ pirate, or bring any seducing message from any pirate,
 “ enemy or rebel, or consult, combine, or confederate with,
 “ or attempt or endeavour to corrupt, any commander, mas-
 “ ter, officer or mariner to yield up or run away with
 “ any ship, goods or merchandize, or turn pirate, or go
 “ over to pirates, or if any person shall lay violent hands
 “ on his commander, whereby to hinder him from fighting
 “ in defence of his ship and goods committed to his trust, or
 “ that shall confine his master, or make or endeavour to make
 “ a revolt in his ship, shall be adjudged to be a pirate, felon
 “ and robber; and being convicted thereof, according to the
 “ direction of this act, shall have and suffer pains of
 “ death, loss of lands, goods and chattels, as pirates, felons
 “ and robbers upon the seas ought to have and suffer.”

A captain doubly
 insured his ship
 and cargo; and,
 having run the
 cargo on shore,
 procured the ves-
 sel to be fraudu-
 lently burnt.
 This is no piracy,
 by reason of the
 special trust re-
 posed in the of-
 fender by his
 owners. 8 Mod
 76, and 67.

Stat. 15.

Señ. 15. And it is farther enacted by the said statute, “ That all and every person and persons whatsoever, who shall either on the land or upon the seas, wittingly or knowingly set forth any pirate, or aid and assist, or maintain, procure, command, counsel, or advise any person or persons whatsoever, to do or commit any piracies or robberies upon the seas; and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever, so as aforesaid, setting forth any pirate, or aiding or assisting, maintaining, procuring, commanding, counselling or advising the same, either on the land or upon the sea, shall be adjudged to be accessory to such piracy and robbery done and committed; And further, That after any piracy or robbery is or shall be committed by any pirate or robber whatever, every person or persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall on the land or upon the sea receive, entertain, or conceal any such pirate or robber, or receive or take into his custody, any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be by this statute likewise adjudged to be accessory to such piracy and robbery: And that all such accessories to such piracies and robberies, shall be enquired of, tried, heard, determined and adjudged according to the common course of the law, according to the said statute of 28 Hen. 8. as the principals of such piracies and robberies may be, and no otherwise; and being thereupon attainted shall suffer such pains of death, loss of lands, goods and chattels, and in like manner as the principals of such piracies, robberies and felonies, ought to suffer according to the said statute of Hen. 8. which is declared to be in full force; any thing in this last act to the contrary notwithstanding.”

Señ. 16. And by 4 Geo. 1. c. 11. s. 7. “ All persons who shall commit any offence for which they ought to be adjudged pirates, felons or robbers, by 11 & 12 Will. 3. may be tried and judged for every such offence, according to the form of 28 Hen. 8. and shall be excluded from their clergy.”

† *Señ. 17.* And it is also enacted by 8. Geo. 1. c. 24. made perpetual by 2 Geo. 2. c. 28. “ That if any commander or master of any ship or vessel, or any other person, shall any wise trade with any pirate by truck, barter, exchange, or in any other manner; or shall furnish any pirate, felon, or robber upon the seas with any ammunition, pro-

"vision or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply, or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate, felon or robber upon the seas, knowing him to be guilty of such piracy, felony or robbery, such offenders shall, in every of the said cases, be deemed guilty of piracy, felony and robbery, and may be tried, &c. according to the provisions of the 28 Hen. 8. c. 15, and the 11 and 12 Will. 3. c. 71."

† *Sec.* 18. And it is further enacted by the said statute, "That in case any person or persons, belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship and vessel, and, tho' they do not seize and carry off such ship or vessel, shall throw over board or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person or persons who shall be guilty thereof, shall in all respects be deemed and punished as pirates as aforesaid."

† *Sec.* 19. And it is further enacted by par. 2. "That every ship or vessel, which shall be fitted out with a design to trade with, or supply, or correspond with any pirate; and all and every goods and merchandize put on board the same for any purpose or intent as aforesaid, shall be, *ipso facto*, forfeited, one moiety to the king, the other to the informer, who may sue for, and recover the same in the Court of Admiralty."

† *Sec.* 20. And by par. 3. "All persons who are made accessories by the 11 and 12 Will. 3. c. 7. shall be deemed and taken to be principal pirates, felons, and robbers, and shall be proceeded against accordingly." And also, by par. 4. "That all and every offender or offenders convicted of any piracy, felony or robbery by virtue of this act, shall be excluded from the benefit of clergy. Also seamen maimed in fight against pirates shall receive the rewards in the 23 Car. 2. c. 11. and be admitted into Greenwich hospital. And masters or seamen not defending themselves against pirates, or who shall utter any discouraging words, shall, if the ship be taken, forfeit their wages to the owners, and suffer six months imprisonment."

† *Sec.* 21. Also it is enacted by 18 Geo. 2. c. 30. "That all persons, being natural born subjects or denizens of his majesty, who during any wars have committed any hostilities upon the sea, or in any haven, river, creek, or place, where

The adherence to the king's enemies was thought to make the offence high treason. This statute was made therefore to remove the doubt.

“ where the admiral or admirals have power, authority, or
 “ jurisdiction, against his majesty’s subjects by virtue or under
 “ colour of any commission from any his majesty’s enemies
 “ upon the sea, or any the places where the admiral hath
 “ jurisdiction as aforesaid, may be tried as pirates, felons, and
 “ robbers in the said Court of Admiralty, on ship board, or
 “ upon the land, in the same manner as persons guilty of
 “ piracy, felony, and robbery are directed to be tried; and on
 “ conviction shall suffer as any other pirates, &c. ought by
 “ virtue of the 11 and 12 Will. 3. c. 7. or any other act,
 “ provided that any person who shall be tried and acquitted,
 “ or convicted according to this act for any of the said crimes,
 “ shall not be liable to be prosecuted for the same crime or
 “ fact, as high treason. But this act shall not prevent any per-
 “ sons who shall not be tried according to it, from being tried
 “ for high treason, by 28 Hen. 8. c. 5.”

By 22 Geo. 3. c. 25. all contracts for ran-
 coming any private vessel, &c.
 captured by the king’s enemies
 are void, and the offender liable to
 a penalty of 500l. Wood’s Inst.
 369, 473.

† *Stat.* 22. And it is further enacted by 32 Geo. 2. c. 25.
 f. 12. “ That in case any commander of any private ship of
 “ war, duly commissioned according to the directions of this
 “ act, or the 29 Geo. 2. c. 34, shall agree with the com-
 “ mander or other person of, or belonging to any neutral or
 “ other ship or ships, vessel or vessels, except those of his
 “ majesty’s declared enemies, for the ransom of any such
 “ neutral or other ship, &c. or the respective cargo or cargoes
 “ thereof, or any part thereof, after the same shall have been
 “ taken as prize, and shall, in pursuance of any such agree-
 “ ment or agreements, actually quit, set at liberty, or dis-
 “ charge any such prize or prizes, instead of bringing the
 “ same into some port or ports belonging to his majesty’s
 “ dominions, every such offender shall be deemed guilty of
 “ piracy, felony and robbery, and on conviction (in the manner
 “ as the act describes) shall suffer such pains of death, &c. as
 “ pirates, felons, and robbers upon the seas ought to suffer
 “ according to the laws now in being. But it is provided,
 “ that the commander of any private ship of war, upon the
 “ capture of any neutral vessel, *which by any law or treaty shall*
 “ *be liable only to the forfeiture of such contraband goods as shall be*
 “ *on board thereof*, may receive such goods, in case the com-
 “ mander is willing to deliver them, and thereupon quit, set
 “ at liberty, or discharge such neutral ship or vessel.”

† *Stat.* 23. And for the more speedy bringing of offenders
 to justice, and to prevent the inconveniencies occasioned by
 want of frequently holding a session of admiralty for the trial of
 offences committed on the high seas, it is further enacted, by
 30 Geo. 2. c. 25. f. 20. “ That a session of oyer and terminer
 “ and gaol delivery, for the trial of offences committed upon
 “ the high seas, within the jurisdiction of the admiralty of

"England, shall be held twice at the least in every year, that is to say, in the several months of March and October in each year, at Justice Hall in the Old Bailey, London; except at such times as the sessions of oyer and terminer and gaol delivery for the city of London and county of Middlesex shall be appointed to be there held; or in such other places within *England* as the lord high admiral of Great Britain, or the commissioners for executing the office, or any three or more of them shall, in writing under their hands, directed to the judge of the court of admiralty for the time being, appoint."

4 Comm. 265.

† *Stat.* 24. Any one of the commissioners named in the commission of oyer and terminer for trying the offences aforesaid, and also any justice of the peace may take informations, upon oath, touching any piracy, felony, or robbery committed as before recited, and, by warrant under hand and seal, cause the offender to be apprehended and committed to the county gaol, and shall bind over all persons whom they shall respectively judge necessary to appear, prosecute, and give evidence against the said offender at the then next admiralty sessions, which information and recognizance shall be transmitted to the register to be laid before the court, and the marshal, his deputy, all sheriffs, and other officers whatsoever for keeping of the peace, &c. are enjoined diligently to obey and execute the precepts and orders of the court.

Vide section 21 to 24 of the before recited statute.

For the form of an indictment in piracy, vide *Cro. Clr. Com.* 500.

CHAPTER THE THIRTY-EIGHT.

O F B U R G L A R Y.

AND now we are come to offences against the habitation of a man, which are of two kinds, *viz.* Burglary and Arson.

F. Cor. 178, 185, 264.

Burglary is a felony at the common law, in breaking and entering the mansion-house of another, or, as some say, the walls, or gates of a walled town, in the night, to the intent to commit some felony within the same, whether the felonious intent be executed or not.

Pulton 132.
Staun. 30.
1 Hale 549.
Dal't. c. 151.
Cicero pro. dom. c. 41.
Leg. Can. l. 61.
Wilk. leg. Ang.
Sax. p. 273.

Selman tit. Hamfecken. Sum. 79. 2 Hale 360. 22 Aff. 39, 95. B. Cor. 93. 3 Inst. 63. Comm. 31. 4 Comm. 223.

For the better understanding whereof, I shall consider the following particulars:—First, What shall be accounted night-time for this purpose. Secondly, Whether there must be both

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an actual entry and breaking. Thirdly, What breaking is sufficient. Fourthly, What entry. Fifthly, In what place this offence may be committed. Sixthly, What degree of guilt is required in the principal intention.

Sec. 2. As to the first point, *viz.* What shall be accounted night-time for this purpose; there are some opinions, That burglary may be committed at any time after sun-set, and before sun-rising; but it seems the much better opinion, That the word *noctanter*, which is precisely necessary in every indictment for this offence, cannot be satisfied in a legal sense, if it appear upon the evidence, that there was so much day-light at the time, that a man's countenance might be discerned thereby.

Dalt. c. 151.
S. P. C. 30.
3 Inst. 63.
Savil. 47.
Crom. 32. 33.
7 Co. 6. 34.
Summary 79.
1 Hale 550.
Roll. 524.
Moor 660.

Cro. Eliz. 583. 9 Co. 66. 4 Comm. 224.

Sec. 3. As to the second point, *viz.* Whether there must be both an entry and breaking. Notwithstanding some loose opinions to the contrary, there seems to be no good cause to doubt, but that both are required to compleat this offence; for the words, *fregit* and *intravit*, being both of them precisely necessary in the indictment, both must be satisfied: And *a fortiori* therefore there can be no burglary, where there is neither of them; as if on a bare assault upon a house the owner sling out his money.

Dyer 99.
S. P. C. 30.
3 Inst. 64.
Summary 80.
1 Hale 551, 555,
556.
Con. Dalt. c.
151.
Crom. 31.
Dallison 22. Pult. 132. Foster 108. O. B. 1785. p. 216.

Sec. 4. As to the third point, *viz.* What breaking is sufficient. It seems agreed, That such a breaking as is implied by law in every unlawful entry on the possession of another, whether it lie open or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice & burglariter fregit*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, That if one enter into a house by a door which he finds open, or through a hole which was made there before, and steal goods, &c. or draw any thing out of a house through a door or window which were open before, or enter into a house by the doors open in the day-time, and lie there till night, and then rob and go away, without breaking any part of the house, he is not guilty of burglary.—But it is certain, That he would have been guilty thereof if he had opened the window, or unlocked the door, or broke a hole in the wall, and then had entered, &c. or if having entered by a door which he found open, or having lain in the house by the owner's consent, he had but unlatched a chamber door; or if he had come down by the chimney: (in which case though

3 Inst. 64.
Sum. 80. 82.
1 Hale 508, 527,
551, 552, 555.
Crom. 34. 32.
Dalt. c. 151.
Kelynge 67.
Hutton 20.
C. Car. 65, 225.
Dyer 99.
2 Hale 558.
1 And. 114. 115.
Dalt. c. 151.
Savill. 59.
Foster 107.
O. B. 1784. p.
744.

might be said, That the house was open there, and so not really broken; yet it was as much inclosed as the nature of thing would bear.) And according to some opinions, he could have been in like manner guilty, if upon an assault made by him upon the house, with an intent to rob it, the owner had opened the door in order to drive him off, and thereupon he had entered. In which case, as some say, the raising of the door by the owner, being occasioned by the malicious attempt of the other, is as much imputable to him as if it had been actually done by his own hands.

O. B. 1784.
P. 744.

Cromp. 32.
Contra 1 Anderson 115.

Sec. 5. And it has also been resolved, That where divers persons came to a house with an intent to rob it, and knocked at the door, pretending to have business with the owner, and being by that means let in, rifled the house, they were guilty of burglary (a). Also it hath been adjudged, That those were no less guilty, who having a design to break into a house, took lodgings in it, and then fell on the landlord and robbed him; for the law will not endure to have its justice frustrated by such evasions. And for the like reason, *a fortiori*, it has been resolved, That where persons, intending to rob a house, raised a hue and cry, and prevailed with the constable to make a search in the house, and having got in by that means, without the owner's consent, bound the constable, and robbed the inhabitants, they were guilty of burglary. For there cannot be a greater affront to publick justice, than to make use of legal process as a stale for such villainous purposes; and therefore the whole act is esteemed tortious *ab initio*.

(a) Le Motta case related by Wild to Kelynge 42.
Kely. 52, 52.63,
O. B. 1784. No. 541.
Crom. 32.
Dalt. c. 151.
Summary 81.
1 Hale 552.
3 Inst. 64.
4 Comm. 225

Sec. 6. It is recited by 12 Ann. c. 7. "That there should be some doubt, Whether the entering into a mansion-house, without breaking the same, with an intent to commit some felony, and breaking the said house in the night-time to get out, were burglary." And thereupon it is declared and enacted, "That if any person shall enter into the mansion or dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony, or being in such a house, shall commit any felony, and shall in the night-time break the said house to get out of the same, such person is, and shall be taken to be, guilty of burglary, and ousted of the benefit of clergy, in the same manner as if such person had broken and entered the said house in the night-time, with an intent to commit felony there."

Sec. 7. As to the fourth point, *viz.* What entry is sufficient to this purpose. It seems agreed, That any the least entry, either with the whole, or with but part of the body, or with any instrument, or weapon, will satisfy the word *entry* in an indictment of burglary; as if one do but put his foot over a threshold, or his hand, or a hook, or pistol, within

Dalt. c. 152.
Summary 81.
Kelynge 67.
Pulton 132.
1 And. 115.
1 Hale 553, 555.
Foster 108.
Crom. 31, 32.
4 Comm. 245.

within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c. (1)

(1) But *querre*, if the instrument must not be introduced for the purpose of committing the felony. Therefore, where thieves, having bored a hole *through* the door with a center bit, and part of the chips were found in the inside of the house, yet, as they had neither got in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entering was ruled incomplete. O. B. 1785. p. 216.

1 Hale 439, 555.
Sum. 80, 81.
Fost. 350, 353.
Kely. 111.
Crom. 32.

Sec. 8. Nay, it is certain, That in some cases one may be guilty of burglary, who never made any actual entry at all; as where divers come to commit a burglary together, and some stand to watch in adjacent places, and the others enter, and rob, &c. For in all such cases, the act of one is in judgment of law the act of all.

Con. Sum. 81.
Dalton 151.
1 Hale 555.

Sec. 9. And upon the like ground, it seems difficult to find a reason, why a servant who confederating with a rogue, lets him in to rob a house, &c. should not be guilty of burglary as much as he; for it is clear, That if the servant were out of the house, the entry of the other would be adjudged to be his also; and what difference is there when he is in the house? (2)

(2) It has been determined, by all the judges, upon a special verdict, that it is burglary in both the servant and the thief; and not to be distinguished from the case where one watches at the street end, while others go in. *Strange 881.* O. B. 1784, No. 520. 10 St. Tr. 433.

1 Hale 550.
4 Co. 40.
3 Inst. 64, 67.
Sum. 82, 86.
3 Inst. 64.
Braft. 144.
B. Cur. 93.
22 Aff. 39, 95.
Dilt. 151.
27 Aff. 78.
Fost. 38, 39.
1 And. 302.
S. P. C. 30.
Keilnge 27.
Popham 42.
Prin. P. L. 274.
Spec. Gloss.
Verb. Burglaria.

Sec. 10. As to the fifth point, *viz.* In what place this offence may be committed. It seems to be the current opinion at this day, That it can be committed only in a dwelling house; and that the indictment for it must necessarily alledge the fact *in domo mansionali*. And Sir Edward Coke seems to say, That the breaking a church, &c. is therefore burglary, because the church is the mansion-house of God. But I can find nothing in the more ancient authors to countenance this nicety; for the general tenor of the old books seems to be, That burglary may be committed in breaking houses, or churches, or the walls, or gates of a town. And Staunforde and Anderjyn mentioned precedents of indictments of burglary *in domo* without adding *mansionali*. However the constant course of late precedents and opinions makes it certainly a very dangerous, if not an incurable fault, to omit the word *mansionalis* in an indictment of burglary in a house; and therefore without question, it ought always to be inserted where the truth of the case will bear it. But surely it cannot be necessary or proper to have any such word in an indictment of burglary in a church, which by all the books above cited, seems to be taken as a distinct burglary from that in a house.

1 Hale 556.
Summery 82.
Crom. 32.
Dalton 151.
1 Moor 600.

Sec. 11. However it is agreed by all, That a house wherein a man dwells but for part of the year, or a house which one has hired to live in, and brought part of his goods into, but has not yet lodged in, or a chamber in one of the inns of court

court wherein a person usually lodges, or house which a man's wife hires without his privity, and lives in by herself without him, may be called his dwelling-house; and will sufficiently satisfy the words *domus mansionalis* in the indictment, whether any person were actually therein, or not, at the time of the offence.

Sec. 12. Also all out-buildings, as barns, stables, dairy-houses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them; but if they be removed at any distance (a) from the house, it seems that it has not been usual of late to proceed against offences therein as burglaries.

O. B. 1785, No. 483. (a) An out-house, occupied with, but separated from, the dwelling house, by an open passage eight feet wide, and not within or connected by any fence inclosing both, is not within the curtilage. *Rex v. Garland*, East. T. 1776, M. S.

Sec. 13. If several persons dwell in one house, as servants, guests, tenants at will, or otherwise, having no fix'd and certain interest in any part thereof, and a burglary be committed in any of their apartments; it seems clear, that the indictment shall lay the offence in the mansion-house of the proprietor, &c.—But if one hire a distinct apartment in a house for his lodging for a certain time, and a burglary be committed therein, I can see no good reason why the indictment may not lay the offence in *domo mansionali* of such lodger; for it seems to be agreed, That an indictment for a burglary committed in a chamber in one of the inns of court, may lay the offence in *domo mansionali* of the owner of the chamber; (b) and why may not such an apartment, with as much propriety be called the mansion-house of him that takes it, during the time that he has a certain interest in it? For so long as it is severed by the lease, it seems in the eye of the law to be as distinct from the other parts of the house, as if the person who rents it had a freehold or inheritance in it.

heritance; for life, or during residence.—So, a house divided into separate tenements, with a distinct outward door to each, will be separate houses, as *Newcastle House*. See *v. Gansel*, Cowper 1.—2 Saik. 552.

Sec. 14. As to the objection, That he goes into the house by the same door with the other inhabitants, and therefore is but an inmate, and the whole ought to be considered but as one house; I answer, That he must have some way to his apartment as incident to his interest in it, and that such way lying through a door which is common to him with others, doth not make the apartment itself in any respect less his own, than a way through a door belonging to himself only would have done; (c) and if the law be so in this case, it seems to me very reasonable also, That if such a lodger take also a cellar in

which he does not sleep in any part of the house; for in that case each apartment is a separate mansion. *Turner's Case*. Hil. 27 Geo. 3. M. S. vide *Turner's Case*, O. B. 1784. p. 391.

4 Coke 40.
1 Jones 394.
Kely. 43. 46.
Pop. 42. 52.
3 Institute 64.
Pulton 132.
Foiler 177.

3 Institute 64.
Dalt. c. 151.
B. Cor. 180.
Crompton 32.
1 Hale, 558.
Summary 82.
Kely. 27, 52, 82.

4 Comm. 245.

O. B. 1785,
p. 971.
1 Hale 556.
Con. Kely. 83.
Crom. 33.
Dalt. c. 151.
3 Inst. 65.
Co. Lit. 48.
Summary 83.

(b) Chambers have separate outward doors, which are the extremity of obstruction; and are enjoyed as separate property, as estates or in-

(c) There being only one door in common to all the inhabitants, makes no difference, where the

(a) Provided the owner does not dwell in any part of the house.—*Sed quare* for Kel. 33. seems contra.

the said house, a burglary committed in such cellar, may be alledged in *domo mansionali* of the lodger, whether the cellar had any communication with the house or not (a) for since it seems to be agreed, That a barn or stable, or other out-building near to a house, shall be looked on as part thereof, why should not such a cellar have the like estimation.

Sett. 15. However it is agreed by all, That if one hire a part of a house to lodge in, which is actually divided from the rest, and have a door of its own to the street, a burglary therein may be alledged in *domo mansionali* of such person. (b)

(b) If the owner live under the same roof with the inmates, there must be a separate outer door or the whole is the mansion of the owner; but if the owner inhabit no part of the house, or even if he occupy a shop or a cellar in it, but do not sleep therein it is the mansion of each lodger, although there be but one outer door. *Rogers's Case*, Mich. 13 Geo. 3. M. S.

Hutton 33.
1 Hale 557, 558.
vide 13 Geo. 3.
c. 38 respecting
burglary in the
work-shops of
the plate glass
manufactory.

Sett. 16. But if he had taken it as a shop or work-house for his use in day-time only, it seems that a felony therein cannot be alledged in a mansion-house; not of him that lets it, because it is severed by the lease from that part of the house which belongs to him, nor of him to whom it is let, because he takes it not to lodge in. (c)

(c) If he sleep in any part of the building, however distant that part is from the shop, it may be alledged his mansion-house; provided the owner does not sleep under the same roof also. *Carroll's Case*, Easter Term, 1782, M. S.

22 Aff. 95.
B. Cor. 93.
S. P. C. 30.
Dalt. c. 151.
But by 5 &
6 Edw. 6. c. 9.
clergy is taken
from this of-
fence.

Sett. 17. From what has been said it clearly appears, That no burglary can be committed by breaking into any ground inclosed, or booth, or tent, &c. for there seems to be no colour from any authority ancient or modern, to make any offence burglary that is not done either against some house, or church, or the walls, or gates of some town.

Dyer 99.
Dalif. 22.
3 Infl. 65.
Kely. 30, 67.
Sum. 23, 125.
Cren. 32.
Con. Dalt. c.
151.
1 Hale 562.

Sett. 18. As to the sixth point, viz. What degree of guilt is required in the principal intention of the offender? It seems clear, That there can be no burglary but where the indictment both expressly alledges, and the verdict also finds, an intention to commit some felony; for it appear that the offender only meant to commit a trespass, as to beat the party, &c. he is not guilty of burglary. (d)

(d) A servant embezzled money intrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. *Rex v. Bingley*, O. B. Trin. 3 Jac. 2. M. S.

(e) King v.
Gray, Strange
481, expressly
in point.

Sett. 19. However it seems much the better opinion, That an intention to commit a rape, (e) or such other crime which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law, because whenever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law.

† *Stat.* 20. To remove an inducement for the frequent commission of Burglaries, &c. By 10 Geo. 3. c. 48. "Buyers or Receivers of stolen jewels, gold or silver plate, watches, where the stealing shall have been accompanied with a burglary, or a robbery on the highway, shall be triable as well before the conviction of the principal, whether he shall be in or out of custody, as after—and transported for fourteen years."

Vide Appendix the Seventh, p. 235.

† *Stat.* 21. And to check this offence in its progress. y 23 Geo. 3. c. 88, "If any person shall be apprehended, having upon him, any picklock key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, ware-house, coach-house, stable, or out-house, he shall be deemed a rogue and vagabond within the 17 Geo. 2. c. 5."

Vide O.B. 1786, p. 485, for an opinion upon this act. N. B. This was a misdemeanour at common law. *Cass temp. Hardwicke*, p. 371.

EVERY man's house is considered as his castle, as well for his defence against injury and violence, for his repose. 5 Co. 92. To violate this security is considered of so atrocious a nature. 4 Comm. 26, that the alarmed inhabitant, whether he be the owner or a mere inmate, *Cro. Car.* 544, is permitted to repel the violence by the death of the assailant, without incurring the penalties of even culpable homicide, 24 Hen. 8. c. 5; and, should the aggressor escape with impunity from the execution of his guilty purpose, the sword of public justice stands also ready drawn against his life, *Prin. L.* 273. So anxiously indeed does the law interpose its concern to preserve inviolate this domestic immunity, that the bare intention to commit the felony constitutes the essence of the crime. *Comm.* 227. *Foster* 109. In this point, burglary seems to participate the principles of high treason. *Brook Ab. Tit. Forfeitt.* The penal consequences however are less severe; The forfeiture of property is not so extensive; and for a course of time, the life of the convict was saved by the merciful plea of clergy. 4 Comm. But as the increase of national opulence mislaid richer temptations to the spoiler, the interposition of additional terrors became necessary. *hence* by 18 Eliz. c. 7. clergy is taken away from the offence. 4 Comm. 366. 2 Hale 364. *Post.* 17. and by 3 & 4 W. & M. c. 9. from accessories before the fact.—By 10 & 11 Will. 3. c. 1. Whoever shall convict a burglar is exempted from all parish and ward offices, where the felony was committed. To this the 5 Ann. c. 31. has super-added a reward of forty pounds, and if an accomplice being out of prison, shall convict two or more offenders, he is intitled also a pardon of the felonies as enumerated in the act.

CHAPTER THE THIRTY-NINTH.

OF ARSON.

ARSON is a felony at common law, in maliciously and voluntary burning the house of another by night or day.

And I shall consider: First, What is such a house in which arson may be committed. Secondly, Whether this offence may be committed in the offender's own house. Thirdly, How much of the house ought to be burnt. Fourthly, With what degrees of malice.

Stat. 1. As to the first point, viz. What is such a house in which arson may be committed. It seems agreed, That it is only a mansion-house, and the principal parts thereof, but not any other house, and the out-buildings, as barns and outhouses, adjoining thereto; and also barns full of corn, where-

1 Hale 556.
B. Cor. 133,
155.
S. P. C. 36.
3 Inst. 66.
Dalt. c. 105.
2 Inst. 188.
4 Comm. 228.

3 Inst. 67.
4 Co. 20.
Dalt. c. 105.
11 H. 7. 1.
B. Cor. 226.
3 Inst. 69.
S. P. C. 36.

Summary 86. 1 Hale 567, 579. 4 Comm. 221, 366, 370.

ther they be adjoining to any house or not, so far secured by law, that the malicious burning of them is arson. And it is said, That in an indictment they are well expressed by the word *domus*, without adding *mansionalis*.

1 Hale 568.

Summary 86.

3 Inst. 67.

Britt. f. 16.

S. P. C. 36.

Dalt. c. 105.

2 Burn. 289.

(a) A prison

the entrance to

which is through

a dwelling house

is within this

act. Donevan's

Case Black. 682.

(b) Accessories

before are ex-

cluded by 4 & 5

P. & M. c. 4.

But accessories

after are still in-

titled to clergy.

1 Hale 573.

(c) The King v. Spalding, East. T. 1780.

Breemes Case, Trin. T. 1780.

Pedley's Case, B. R.

upon a special verdict, Trin. 22 Geo. 3.

(d) Vide Alex. Poulter's Case, 11 Coke 29.

Sett. 2. But it seems that at this day the burning of the frame of a house, or of a stack of corn, &c. is not accounted arson, because it cannot come under the word *domus*, which seems at present to be thought necessary in every indictment of arson. Yet it is said, That anciently the burning of a stack of corn was accounted arson. † And by the 9 Geo. 1. c. 22. whoever shall set fire to any house, (a) barn, or out-house; "or to any hovel, cock, mow, or stack of corn, hay, or wood; or shall forcibly rescue any person in lawful custody for the same; or shall procure another to join in committing any of the said offences,—shall suffer death, without benefit of clergy."—But it is resolved, (b) that this statute only excludes the principal (c) offender from his clergy, more clearly than he was excluded before (d); and does not alter the nature of the crime, or create any new offence.

Holme's Case.

1 Jones 351.

C. Car. 377.

Sed. vide Foster

116.

Sett. 3. As to the second point, viz. Whether arson may be committed in the offender's own house. It seems clearly agreed, That one seised in fee, or but possessed for years, of a house standing by itself at a distance from all others, cannot commit felony in burning the same. (e)

1 Hale 568, 569.

3 Inst. 67.

Dalt. c. 105.

Cro. Car. 238.

Kelynge 29.

Foster 115, 116.

Also it seems the much stronger opinion, That a man so seised or possessed of a house in town, who burns his own with an intent to burn his neighbours, but in the event burns his own only, is not guilty of arson; for by the general tenor of the books speaking of this offence, it seems to be supposed to be done in the house of another, and not of the offender. Neither shall any act, which is only a crime in respect of the injury which it does, or may do, to another, be made a felony by reason of an intention thereby to commit a felony, if such intention be not executed.—However this is certainly an offence highly punishable in regard of the malice thereof, and the great danger

(e) A lessee for three years in *possession*, under a term for 99 years, originally granted by the person seised in fee, is not guilty of ARSON, by setting the house on fire. Breemes Case, Trin. 20 Geo. 3. M. S.—Nor a tenant by copyhold in *possession*, although the premises burnt, are surrendered to the lord to the use of a mortgagee, not admitted upon the surrender. Rex v. Spalding, Easter Term, 1780. *Sed quere* if this point was determined, the indictment only charging that he burnt his own house, M. S.—Nor can a tenant in possession, be guilty of this offence, by setting the house on fire; for the principle in Holme's Case, was intended to protect the person in actual possession. But Lord Mansfield seems to lament, while he is forced to admit the authority of that decision. Pedley's Case, B. R. Trin. 22 Geo. 3.—It is however determined that a widow, intitled to dower, but no dower assigned, from a house, the equity of the redemption of which had descended from her husband to her infant children, and for whose benefit she had let it and received the rent, is guilty of arson by burning it in the possession of her tenant.—And it was said that if she had been seised of the freehold, it would still have been felony; from whence it is contended that a reversioner who shall maliciously fire the houses in possession of his tenants under leases from himself or his ancestors, will be guilty of Arson. Harris's Case, Foster 113, to 116.—And there is a late case in which a pauper, who set fire to the parish work house, was held guilty of Arson.

court wherein a person usually lodges, or a house which a man's wife hires without his privity, and lives in by herself without him, may be called his dwelling-house; and will sufficiently satisfy the words *domus mansionalis* in the indictment, whether any person were actually therein, or not, at the time of the offence.

5 Co. 40.
C. Car. 474.
1 Jon. 394.
Kely. 43, 46
52, 54.
Pop. 42, 52.
3 Inst. 64.
Skim. 685.

Pult. 132. 133. Foster 177.

Sett. 12. Also all out-buildings, as barns, stables, dairy-houses, &c. adjoining (a) to a house, are looked upon as part thereof, and consequently burglary may be committed in them; but if they be removed at any distance from the house, it seems that it has not been usual of late to proceed against offences therein as burglaries.

3 Inst. 64.
Dalt. c. 151.
B. Cor. 180.
Crom. 32.
1 Hale, 558.
559. Sum. 82.
Kely. 27, 52,
83.

O. B. 1785, No. 483. (a) Vide *Rex. v. Garland*, Somerset Lent Ass. 1776, before Mr. Baron Eyre, for the distance at which an out-house is considered part of the dwelling.

4 Comm. 245.
before Mr. Baron

Sett. 13. If several persons dwell in one house, as servants, guests, or tenants at will, or otherwise having no fix'd and certain interest in any part thereof, and a burglary be committed in any of their apartments; it seems clear, that the indictment shall lay the offence in the mansion-house of the proprietor, &c. But if one hire a distinct apartment in a house for his lodging for a certain time, and a burglary be committed therein, I can see no good reason why the indictment may not lay the offence in *domo mansionali* of such lodger; for it seems to be agreed, That an indictment for a burglary committed in a chamber in one of the inns of court, may lay the offence in *domo mansionali* of the owner of the chamber; (b) and why may not such an apartment, with as much propriety be called the mansion-house of him that takes it, during the time that he has a certain interest in it? For so long as it is severed by the lease, it seems in the eye of the law to be as distinct from the other parts of the house, as if the person who rents it had a freehold or inheritance in it. And as to the objection, That he goes into the house by the same door with the other inhabitants, and therefore is but an inmate, and the whole ought to be considered but as one house; I answer, That he must have some way to his apartment as incident to his interest in it, and that such way lying through a door which is common to him with others, doth not make the apartment itself in any respect less his own, than a way through a door belonging to himself only would have done.

O. B. 1785,
p. 971.
1 Hale 556.
Crom. Kely. 83.
Vide f. 11.
Crom. 33.
Dalt. c. 151.
3 Inst. 65.
4 Comm.
Co. Lit. 48.
Summary 83.

(b) From the nature of these buildings, they are all as several houses, and have separate outward doors, which are the extremity of obstruction, because the staircase is no outer door. Again, they are enjoyed as separate property. In Lincoln's inn they have separate estates of inheritance; in the

whereas they have estates for life, and in colleges as long as they reside. So, if that which was one house originally, comes to be divided into separate tenements, and there is a distinct outward door to each, they will be separate houses, as Newcastle house. *Lee v. Ganfel*, Cowper 1.

Sett. 14. And if the law be so in this case, it seems to me very reasonable also, That if such a lodger take also a cellar in

O. B. 1784,
p. 392.

Kelynge 83.

the said house, a burglary committed in such cellar, may be alledged *in demo mansionali* of the lodger, whether the cellar had any communication with the house or not; for since it seems to be agreed, That a barn or stable, or other out-building near to a house, shall be looked on as part thereof, why should not such a cellar have the like estimation? *Sed quare*, for Kelynge seems to incline to a different opinion.

Sett. 15. However it is agreed by all, That if one hire a part of a house to lodge in, which is actually divided from the rest, and have a door of its own to the street, a burglary therein may be alledged *in demo mansionali* of such person. (4)

(4) Even tho' there may be other inmates in the house, *Ld. Mansfield Hill* 14 Geo. 3. and even tho' the owner occupy a shop or a cellar under the same roof, provided he does not sleep in either of them; because the lodger has the outward door entirely to himself. But if the owner sleep in any part of the house, it must be laid as the mansion of the owner, and not of the lodger. *Cowp.* 8. *O.B.* 1784, p. 392. 2 *Burr. Sett. Cal.* 212, 217.

Summary 83.

Hutton 33.

1 *Hale* 557, 558.

Sett. 16. But if he had taken it as a shop or work-house for his use in the day-time only, it seems that a felony therein cannot be alledged in a mansion-house; not of him that lets it, because it is severed by the lease from that part of the house which belongs to him, nor of him to whom it is let, because he takes it not to lodge in.

† Therefore to protect a rising manufactory, by 13 Geo. 3. c. 38. s. 29. "Whoever shall by day or night break into any house, shop, cellar, &c. belonging to the plate glass manufactory, with intent to steal, shall be transported for fourteen years."

Sum. 82, 83.

22 *Ass.* 95.

B. Cor. 93.

S. P. C. 30.

Dalt. c. 151.

Crom. 31.

But see 5 and 6,

Edw. 6. c. 9.

Sett. 17. From what has been said it clearly appears, That no burglary can be committed by breaking into any ground inclosed, or booth, or tent, &c. for there seems to be no colour from any authority ancient or modern, to make any offence burglary that is not done either against some house, or church, or the walls, or gates of some town.

Dyer. 99.

Dalif. 22.

3 *inst.* 65.

Kely. 30, 67.

Sum. 83, 125.

Crom. 32.

Cob. Dalt. c.

151.

Infra c. 40.

1 *Hale* 562, f. 3.(d) *King v.*Gray, *Strange*

481, expressly

in point.

Sett. 18. As to the sixth point, viz. What degree of guilt is required in the principal intention of the offender? It seems clear, That there can be no burglary but where the indictment both expressly alledges, and the verdict also finds, an intention to commit some felony; for if it appear that the offender only meant to commit a trespass, as to beat the party, &c. he is not guilty of burglary. However it seems much the better opinion, That an intention to commit a rape, or such other crime which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law, because where-ever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law.

c. 48

punished but as the first offence; for the gentler method shall first be tried, which perhaps may prove effectual.

Señ. 4. As to the second point, viz. What is incidentally implied in every statute, making an offence felony. It seems clear, that every such statute does by necessary consequence subject the offender to the like attainder and forfeiture, &c. and also does require the like construction, as to those who shall be accounted accessaries before or after, and to all other intents and purposes, as is incident to a felony at common law.

3 Inst. 47, 59, 90.
1 Hale 704.
Crompton 42.
Summary 215.
Dalif. 11, 22. b. 2.
c. 29. f. 13, 14.
Salk. 542, 543.
Misprison of felony is as well incidental to a

felony created by statute, as to one at common law. 1 Hale 652.

2 Hale 708.

Señ. 5. Yet where such a statute saves the corruption of blood, it impliedly saves the descent of the land of the offender to his heir. Also where it saves the land to the heir, it prevents the corruption of blood so far. And it is said, That in both cases it saves the wife's dower, because wherever an heir takes as heir, he shall not void a title of dower in respect of the same inheritance. But notwithstanding such a saving, the land shall be forfeited for the life of the offender.

3 Inst. 47.
Summary 2.

1 Hale 703.

Señ. 6. If one commit an offence which is made felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute.

B. Cor. 203.

For a full account of this title, vide 4 Bac. Ab. tit. Statute, and the introduction to Burn's Justice.

CHAPTER THE FORTY FIRST.

O F R A P E.

OFFENCES against Women made felonies by statute are of two kinds. First, Rape. Secondly, Of forcible, impudent and clandestine marriage.

Bract. c. 28.
Leges Gul. l. 19.
1 Hale, c. 58.
4 Comm. c. 15.

In treating of rape, I shall consider, First, What shall be called a rape. Secondly, How it is punished.

Wilk. Leg. Ang. Sax. 222, 290.
2 Inst. 433.

Señ. 1. As to the first point, It seems that rape is an offence in having unlawful and carnal knowledge of a woman, by force and against her will. But it is said, That no assault upon a woman in order to ravish her, howsoever shameless and outrageous it may be, if it proceed not to some degree of penetration, and also of emission, can amount to a rape; however it is said, That emission is, *prima facie*, an evidence of penetration.

Co. Lit. 123.
4 Co. 39, 47.
2 Inst. 180.
12 Co. 37.
3 Inst. 59.
1 Hale 628.
1 St. Tr. 388.
Summary 117.
1 Rush. Coll. p. 2, 94.

Señ.

Dalt. c. 105, 607.
B. Par. 55.
5 Ed. 4, 6.

1 Russ. Col.
part 2, 100.
Bract. 147, 148.

S. P. C. 24.
Finch. 204.
1 Hale 628, 731.

Secl. 2. Offences of this nature are not any way mitigated, by shewing that the woman, at last yielded to the violence, if such her consent was forced by fear of death, or of duress. Nor is it any excuse, that she consented after the fact, or that she was a common strumpet; for she is still under the protection of the law, and may not be forced. But it was anciently said, to be no rape to force a man's own concubine. Also it hath been said by some to be no rape to force a woman who conceives at the time; for it is said, That if she had not consented, she could not have conceived: but this opinion seems very questionable, not only because the previous violence is no way extenuated by such a subsequent consent, but also because, if it were necessary to shew that the woman did not conceive, the offender could not be tried till such time as it might appear whether she did or not, and likewise because the philosophy of this notion may very well be doubted of.

Pulton 134.
1 Hale 630, 633.
Russ. Coll part
2, 100.

Secl. 3. It is a strong, but not a conclusive presumption against a woman, That she made no complaint in a reasonable time after the fact.

Bract. 147.
Dalt. c. 107.
1 Hale, 30.
Crom. 100.
Dyer 304.

Secl. 4. It was a question before 18 Eliz. c. 7. Whether a rape could be committed on a child of the age of six or seven years; but by that statute, "whosoever shall unlawfully and carnally know and abuse any woman-child under the age of ten years, shall suffer as a felon without clergy."

Vide Cro. Cir.
Com. c. 456.
3 Burr. 1696.
C. Car. 332.

Secl. 5. Upon an indictment for this offence, it is no way material whether such child consented, or were forced; yet it must be proved, That the offender entered into her body, &c.

B. 2. c. 29, f. 7,
89.
Dalt. c. 107.
Hutt. 115.
St. Tr. 1, 366.

Secl. 6. All who are present and actually assist a man to commit a rape, may be indicted as principal offenders, whether they be men or women.

Russ. v. 2. p. 93. Vide Lord Baltimore's case, 4 Burr. 2179.

1 Hale 627.
Bract. 147, 148.
S. P. C. 21, 22,
23.
2 Inst. 181.
Dalt. c. 99.
Crom. 32.
con.
Co. Lit. 123.
Fleta 1, c. 40.
2 Inst. 180.
Quære F. Ut.
49.
B. Cor. 169.

Secl. 7. As to the second point, viz. How rape is punished, it is said, that of old time it was felony, and consequently punishable with death, especially if the party ravished were a virgin, unless such virgin would accept of the offender for her husband, in which case she might save his life by marrying him. But afterwards it was looked upon as a great misdemeanour only, but not felony; and the offender was punished with the loss of his eyes and testicles: And by the statute of *Westm.* 1. c. 13. It was reduced to a trespass, subjecting the offender to two years imprisonment, and a fine at the king's will. But the smallness of the punishment proving a great encouragement to the offence, it was made felony again, by the statute of *Westminster* 2. c. 34. and by 18 *Eliz.* c. 7. it is excluded from the benefit of clergy.

CHAPTER THE FORTY SECOND.

OF FORCIBLE, + IMPROVIDENT, AND
CLANDESTINE MARRIAGES.

THE marrying a woman of substance by force, and other offences of the like nature, were made felonies by 3 Hen. 7. c. 2. which was enacted in the following words.

Stat. 1. “Where women, as well maidens as widows and wives having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, be oftentimes taken by mis-doers, contrary to their will, and after married to such mis-doers, or to other by their assent, or defiled, to the great displeasure of God, and contrary to the king’s laws, and disparagement of the said women, and utter heaviness and discomfort of their friends, and to the evil ensample of all other: It is therefore ordained, established and enacted by our sovereign lord the king, by the advice of the lords spiritual and temporal, and the commons in the said parliament assembled, and by the authority of the same, That what person or persons from henceforth, that taketh any woman (so) against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony: And that such mis-doers, takers, and procurators to the same, and receitors, knowing the said offence in form aforesaid, be henceforth reputed and adjudged as principal felons: Provided alway, that this act extend not to any person taking any woman, only claiming her as his ward or bond-woman.”

Vide Kely. 81. and the trial of Haagen Swendzen for forcibly marrying Mrs. Rawlins; Mich. 1 Ann. 5 St. Tr. 450.

Stat. 2. And by 39 Eliz. c. 9. “All persons who shall be principals, or procurers or accessaries before such offence committed, are excluded from the benefit of the clergy.”

Stat. 3. In the construction of the said statute of 3 Hen. 7. c. 2. the following points have been resolved.—First, That the indictment must expressly set forth, both that the woman taken away had land or goods, or was heir apparent, and also that she was married or defiled, because no other case is within the preamble of the statute, to which the enacting clause clearly refers; for it does not say, That what person, &c. that taketh any woman against her will, but what person that taketh any woman *so* against her will.

See 1 Hale, 660, 661, and 5 St. Tr. 468. Far. 101, 102. Hobart 182. C. Car. 483, 485, 488, 492. Dalif. 22. 1 And. 115. 3 Inst. 61. Summary 118. Savil 59.

12 Co. 20, 100, 110.

Hobart 182.
C. Car. 485,
489.

Secl. 4. Secondly, That the indictment ought also to alledge, That the taking was for lucre, because the words of the preamble are so, but that it needs not set forth, That it was with an intention to marry or defile the party, because the words of the statute neither require such an intention, nor does the want thereof any way lessen the injury.

Hobart 182.
C. Car. 485.
1 Hale 660.

Secl. 5. Thirdly, That it is no manner of excuse, That the woman at first was taken away with her own consent, because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power.

C. Car. 493.
3 Keb. 193.
2 Vent. 243,
244.

Secl. 6. Fourthly, That is not material whether a woman so taken away, be at last married, or defiled, with her own consent or not, if she were under the force at the time, because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power.

3 Inst. 61.
Dallf. 22.
S. P. C. 44.
Far. 132.

Secl. 7. Fifthly, That those who after the fact receive the offender, but not the woman, are not principals within this statute, because the words are, *receiving wittingly the same woman so taken*, &c. but it seems clearly, That they are accessaries after the offence, according to the known rules of common law.

C. Car. 482.
Summary 119.

Secl. 8. Sixthly, That those who are only privy to the marriage, but no way parties to the forcible taking away, or consenting thereto, are not within the statute.

C. Car. 488.
Hobart 183.
Summary 119.

Secl. 9. Seventhly, That where a woman is taken by force in the county of *A.* and married in the county of *B.* the offender may be indicted and found guilty in the county of *B.* because the continuing of the force there amounts to a forcible taking within the statute. (1)

(1) A woman thus taken away, and forcibly married, may give evidence against the offender, for he is *no husband de jure*. 1 Hale 661. 4 St. Tr. 455. 4 Comm. 209. Gibb. 418.

† *Secl. 10.* As to improvident marriage it is enacted by 4 & 5 Phil. & Mar. c. 8. " That whoever above the age of fourteen (by flattery, trifling gifts, and fair promises) shall allure and take any woman-child unmarried within the age of sixteen, from and against the consent of her guardians, shall suffer two years imprisonment, and fine at discretion. If the offender deflower, or marry her, five years imprisonment, and fine as before: and if any female above twelve shall consent to unlawful matrimony, she shall forfeit all

“ her lands to the next of kin, during the life of such person
“ as shall so contract matrimony.” (2)

(a) N. B. This forfeiture extends as well to the infant who consents, as to the husband who takes. *Brown's case* Mich. 19 Geo. 3. The marriage must be clandestine, and to the disparagement of the heiress. 3 Mod. 84. If the guardian once consents, he cannot retract. 2 Mod. 128. 6 Mod. 168. A bastard under the care of her putative father, is within this act. Str. 1162. The offence is within the jurisdiction of the king's bench. 4 Mod. 145. 2 Lev. 179. 1 Sty. 162. See also 12 Car. 2. c. 24. 3 Mod. 24. Vaugh. 177. And that the court will grant an information for procuring an improvident or unequal marriage. Lev. 257. 5 Mod. 221.

† *Stat. 11.* Thirdly, As to clandestine marriage. It is enacted by 26 Geo. 2. c. 33. “ That if any person shall solemnize
“ matrimony, except the parties are quakers or Jews, in any
“ other place than a church or public chapel, where banns
“ have been usually published, unless by special licence from
“ the archbishop of Canterbury; or shall solemnize matrimony without publication of banns, unless licence of marriage be first had and obtained from some person or persons
“ having authority to grant the same, he shall be guilty of
“ felony, and transported for fourteen years, and the marriage
“ be null and void.” The prosecution to be within three
“ years.”

† *Stat. 12.* And it is further enacted, par. 16. “ That if
“ any person shall, with intent to elude the force of this act,
“ knowingly and wilfully insert or cause to be inserted in the
“ register book of such parish or chapel as aforesaid, any
“ false entry of any matter or thing relating to any marriage;
“ or falsely make, alter, forge, or counterfeit any such entry
“ in such register, or any such marriage licence, or shall
“ wilfully destroy any register book of marriages, or any part
“ of such register book, or shall cause the same to be done,
“ or shall assist in so doing, or shall knowingly utter or publish the same as true respectively, every person so offending,
“ shall suffer death without clergy.”

Vide Douglas 659, for a determination on this statute, which rendered all marriages illegal which had been celebrated during the space of 28 years in any church or chapel built subsequent to the passing of the act. But by 21 Geo. 3. c. 53. they are rendered valid, and the
clergymen who had celebrated such marriages are exempted from the penalties. Bur. 2230.
1 Black. 632. Ray. 752. Salk. 18, 28, 121. 2 Sid. 71.

CHAPTER THE FORTY-THIRD.

OF OFFENCES AGAINST THE RIGHTS OF MARRIAGE.

OFFENCES against the rights of marriage, at common law, are looked upon as spiritual offences, and punishable only by the Ecclesiastical law, but one of them is made felony, but not excluded from the benefit of the clergy. C. Eliz. 94.

By 1 Jac. 1. c. 11. it is enacted, " That if any person or persons within his majesty's dominion of England and Wales, being married, do marry any person or persons, the former husband or wife being alive, that then every such offence shall be felony, and the person or persons so offending shall suffer death as in cases of felony. And the party and parties so offending, shall receive such and the like proceeding, trial, and execution, in such county, where such person or persons shall be apprehended, as if the offence had been committed in such county, where such person or persons shall be taken or apprehended."

Sec. 2. But it is provided by the said statute, " That nothing therein contained, shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself, the one from the other, by the space of seven years together in any parts within his majesty's dominions, the one of them not knowing the other to be living within that time."

Sec. 3. And it is further provided, " That the said statute shall not extend to any person or persons who shall be at the time of such marriage divorced by sentence in the ecclesiastical court, or to any person or persons where the former marriage shall be by sentence in the ecclesiastical court declared to be void and of no effect: Nor to any person or persons, for, or by reason of, any former marriage had or made within age of consent."

Sec. 4. Also it is farther provided, " That no attainder for this offence shall make or work any corruption of blood, loss of dower, or disinherison of heir or heirs."

Sec. 5. In the construction of this statute it has been holden, First, That not only those who are divorced *a vinculo matrimonii*, but also those who are divorced only *a mensa & thoro causa adulterii* or *sævitie*, are within the exception in this statute, notwithstanding there be not the word *divortiamus*, but only the word *separamus*, in the sentence; because the statute, being penal, shall be construed favourably, and such separations are taken for divorces in common understanding.

3 Inst. 89.
1 R. Abr. 340,
141.
Co. Lit. 79.

Sec. 6. Secondly, Where either of the parties were within the age of consent at the time of the first marriage, that not only such person as was within such age, but also the other who was above it, is within the exception of the statute, because the power of disagreeing to such marriage is equal on both sides.

1 Hale 692.
1 Sid. 171.

Sec. 7. Thirdly, That if the first marriage were beyond sea, and the latter in England, the party may be indicted for it
here,

here, because it is the latter marriage that makes the offence; but if the first marriage were in England, and the latter beyond sea, it is said that the offender cannot be indicted here; — *sed quere*, why not? for the words of the statute are, “That the parties so offending shall receive such and the like proceeding, trial, and execution, in such county where such person or persons shall be apprehended, as if the offence had been committed in such county, where such person or persons shall be taken or apprehended.” (1)

Kely. 80.

(2) On this statute the first and true wife is not an admissible witness against her husband. 1 Hale 692. Even an affidavit made by the first wife to postpone the trial of an indictment against her husband has been rejected. O. B. Feb. 1786. But vide Adding. P. S. 411. But the second woman is competent, even to prove the marriage, for she is not his wife so much as *de facto*. 1 Hale 693. A second husband, not being privy to the first marriage, is intitled to the labour of the supposititious wife during their cohabitation. 4 Geo. 1. Burn's E. L. 106.

In April, 26 Geo. 3. the Duchess of Kingston was tried for polygamy by the house of peers. It was resolved a sentence in the ecclesiastical court against a marriage, in a suit for jactitation does not preclude the crown from proving the marriage on an indictment on this statute. And, admitting that such a sentence were conclusive as to the fact of marriage, the crown may avoid the effect of the conclusion by giving evidence that the sentence had been obtained by fraud and collusion. 11. St. Tr. 262.

CHAPTER THE FORTY-FOURTH.

OF OFFENCES AGAINST THE MEMBERS OF
A MAN'S BODY.

IN treating of offences against the members of a man's body, I shall consider, First, What offences of this nature are esteemed maims. Secondly, How they are punished by the common law. Thirdly, How they are punished by statute.

Fleta l. 1. c. 40.
Brit. b. 1. c. 25.
Bract. 144.
4 Comm. 205.

Sec. 1. As to first point, It seems that such a hurt of any part of a man's body, whereby he is rendered less able in fighting, either to defend himself or annoy his adversary, is properly maim.

S. P. C. 3.
3 Comm. 12.
Co. Lit. 126,
128.
3 Inst. 62, 118.

Sec. 2. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or castrating him, are said to be maims, but the cutting off his ear, or nose, &c. are not esteemed maims, because they do not weaken, but only disfigure him.

F. Cor. 142,
458.
25 Ed. 3. 94.
4 Comm. 206.

Sec. 3. As to the second point, viz. How such offences are to be punished, it is to be observed, that all maim is felony, and it is said, That anciently castration was punished with death, and other maims with the loss of member for member; but afterwards no maim was punished in any case with

Bract. 144.
Fleta l. 1. c. 40.
S. P. C. 37.
3 Inst. 62, 118.
Sum. 133.
Sir. 1100.
And. 137.

the

the loss of life or member, but only with fine and imprisonment. (1)

(1) A person who maims himself that he may have the more colour to beg, may be indicted and find. 7 Inst. 127. And by the like reason a person who disables himself that he may not be impressed for a soldier. 3 Burn. J. 115.

Sec. 4. As to the third point, viz. How such offences are punished by statute, it is enacted by 22 & 23 Car. 2. c. 1. See 5 H. 4. c. 5. See 37 H. 8. c. 6. "That if any person shall on purpose and of malice fore-thought, and by lying in wait, unlawfully cut out, or disable the tongue, put out an eye, slit the nose, cut off a nose, or lip, or cut off or disable any limb, or member of any subject of his majesty, with intention in so doing to maim or disfigure, in any the manners before mentioned, such his majesty's subject, That then and in every such case the person or persons so offending, their counsellors, aiders, and abettors, knowing of, and privy to the offence, as aforesaid, shall be and are by the said statute declared to be felons, and shall suffer death as in cases of felony, without benefit of clergy."

Sec. 5. But it is provided by the said statute, "That no attainder of such felony shall extend to corrupt the blood, or forfeit the dower of the wife, or the lands, goods or chattels of the offender."

Sec. 6. If a man attack another of malice fore-thought, in order to murder him with a bill, or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill, but only to maim him, he may be indicted on this statute, together with all those who were his abettors, &c. and it shall be left to the jury on the evidence, whether there were a design to murder by maiming, and consequently a malicious intent to maim as well as to kill, in which case the offence is within the statute, though the primary intention was murder. (2)

(2) If the maim comes not within any of the descriptions of the act, yet it is indictable at common law, and may be punished by fine and imprisonment. Or an appeal may be brought for it at the common law; in which the party injured shall recover his damages. Or he may bring an action of trespass; which kind of action hath now generally succeeded the place of appeals in smaller offences not capital. Vide post. 2 vol. 15, 160. But it does not seem that in maiming there may be accessories after the fact. Ibid. p. 311.

Sec. 7. And it is enacted by 37 Hen. 8. c. 6. "That whoever shall maliciously, unlawfully, and wittingly cut, or cause to be cut off the ear or ears of any one of the king's subjects otherwise than by authority of the law, chance-medley, sudden affray, or adventure, shall forfeit treble damages to the party grieved, by action of trespass, and ten pounds to the king, in the name of a fine."

offences of maiming cattle, vide *Infra*. ch. 46.

CHAPTER THE FORTY-FIFTH.

OF OFFENCES AGAINST RECORDS.

AT common law the embezzling, defacing, or altering any record, without due authority, was an offence highly punishable by fine and imprisonment, &c. and in many cases it was made felony by the following clause of 8 Hen. 6. c. 12.

3 Inst. 71, 72.
1 Hale 646, to 648.

Stat. 2. "It is ordered, That if any record or parcel of the same, writ, return, panel, process, or warrant of attorney, in the king's courts of Chancery, Exchequer, the one Bench or the other, or in his Treasury, be willingly stolen, taken away, withdrawn, or avoided, by any clerk, or by other person, because whereof any judgment shall be reversed: That such stealer, taker-away, withdrawer, or avoider, their procurators, counsellors, and abbettors, thereof indicted, and by process thereupon made, thereof duly convicted by their own confession, or by inquest to be taken of lawful men, (whereof the one half shall be of the men of any court of the same courts, and the other half of the other) shall be judged for felons, and shall incur the pain of felony: And that the judges of the said courts, of the one Bench or of the other, have power to hear and determine such defaults before them, and thereof to make due punishment, as afore is said."

Stat. 3. In the construction of this clause, it hath been holden: First, That it extends only to the courts which are expressly named; and to the court of Chancery, so far only as it proceeds according to the course of the common law.

3 Inst. 71.
1 Hale 646, to 648.

Stat. 4. Secondly, That it extends not to such offence by the judges of any court; for whereas it begins with expressly naming clerks which are inferior to them, it shall not be intended to include them under the general words following; however by 8 Ric. 2. c. 4. "Judges as well as clerks are to pay a fine to the king, and make satisfaction to the party for falsely entering pleas or raising rolls, or changing verdicts, to the disherison of any one." And they are highly punishable at common law for other offences of like nature, as for inserting a bill of indictment not found by the jury among those which were found, and such like. And justice *Ingram* in the reign of *Edward the First* was fined eight hundred marks, for raising a fine of thirteen shillings and four pence set on a poor man, and making it six shillings and eight pence.

3 Inst. 72.

2 R. 3, 10.
3 Mod. 66.
B. Cor. 174.
B. Tresp. 31.
Con. B. present.
23 indict. 14, 50.
3 Inst. 72.

Sett. 5. Thirdly, That not only such an alteration whereby a judgment is actually reversed, but also such whereby it is reversible, whether it were made before or after the judgment was given, or whether it be or be not afterwards amended by the court, is within this act; for those words in the statute *whereby any judgment shall be reversed*, are taken to have the same purport, as if it were said, whereby any judgment shall be annulled, or lose its force or effect; for it is plain, That the statute cannot intend that the judgment must be actually reversed by writ of error, because it speaks of stealing or carrying away, or avoiding of records, which makes it impossible that the judgment should be reversed at all, because no writ of error can remove a judgment which appears not. And it has been holden, That if *A. B.* be outlawed by the name of *A. C.* and afterwards the record be rased, and *A. B.* inserted, the offence is within the statute, because the record against *A. C.* is annulled, and the judgment prevented, which might have been given on a writ of error for this defect.

2 Roll. 81.

2 R. 3. 10.
S. P. C. 36.
3 Inst. 72.
11 Rep. 34.

Sett. 6. Fourthly, If the offence were committed partly in one county and partly in another, but not so as to amount to a compleat offence within the statute in either, That the party cannot be indicted for a felony, because the counties cannot join in an indictment, and that which is done in one cannot be found in another, but that he may be indicted for a misprision in either county.

2 R. 3. 10, 11.
S. P. C. 36.
3 Inst. 73.

Sett. 7. Fifthly, That the act, by making those who are accessary before the fact principal felons, does not mean any way to favour those who are accessary after, but to leave them to the general construction of the law.

3 Inst. 72.
Con. S. P. C.
44.

Sett. 8. Sixthly, That by the last clause of the act, the justices of either bench have a concurrent authority, and that they which shall first enquire shall proceed; and that if the offence were committed in the county where the benches sit, they need no other commission; but if it were done in another county, that they must have a special commission: And if in London, that they shall have a commission in which the mayor shall be omitted, for the charters of the city, which require that he shall be a principal in every commission, extend not to such causes which are specially limited to particular judges.

3 Inst. 73.

3 Inst. 72.
2 R. 3. 11.

Sett. 9. By 21 Jac. 1. c. 26. "It is made felony without the benefit of clergy, but not so as to corrupt the blood, to acknowledge or procure to be acknowledged, any fine, recovery, deed inrolled, statute, recognizance, bail, or judgment in the name of any other person or persons not privy or consenting to the same.

Sett. 10. In the construction hereof it has been holden, That if a man personate another in the county of *A.* in putting in bail before a judge, and the bail be filed in the county of

2 Jon. 64.

of *B.* the trial shall be in the county of *A.* Also it seems the bare personating of bail before a judge is no felony, unless the bail be filed; † and if it be not filed the (a) acknowledging thereof in another name makes not felony, but a misdemeanor only. (1)

Contra in the report of the same case.
1 Ven. 301, 302.
(a) 1 Hale 696.

(1) Two people put in bail in feigned names in the Common Pleas, and because there were no such persons, they could not be prosecuted for personating bail on this statute; but the court ordered them and the attorney to be set in the pillory, which was done accordingly. Strange 384.

Stat. 11. Also it is enacted by 4 & 5 Will. & Mar. c. 4.
“ That any person or persons who shall before any commissioner authorized to take bail, by virtue of the said statute, in actions depending in the courts of King’s Bench, Common Pleas, or Exchequer, represent, or personate any other person or persons, whereby the person or persons so represented and personated, may be liable to the payment of any sum or sums of money, or debt, or damages to be recovered in the same suit or action, wherein such person or persons are represented and personated, as if they had really acknowledged and entered into the same, being lawfully convicted thereof, shall be adjudged felons.”

4 Blac. Com.
128.

CHAPTER THE FORTY-SIXTH.

OF OFFENCES RELATING TO CATTLE.

BY 22 & 23 Car. 2. c. 7. it is made felony, “ Maliciously, unlawfully, and willingly, to kill or destroy any horses, sheep, or other cattle of any person or persons whatsoever in the night-time, but liberty is given to the offender to avoid judgment of death, by choosing judgment of transportation for seven years; and any three justices of peace for the county, division, city, town corporate, or place, whereof one to be of the quorum, are authorized to enquire as well by the oaths of twelve lawful men of the same county, as by examination of witnesses upon oath, or by any lawful ways or means, which to them shall seem meet; of the said offences, and in order thereunto to issue out warrants, as well for the summoning of jurors, as for the apprehending of all persons, who shall or may be suspected thereof, and to take their examination touching the same, as also to cause all such other persons as to them shall seem likely to make discovery thereof, to appear before them, and to give information upon oath concerning their knowledge of the premises, so as no person so to be examined shall in any wise be proceeded against for any offence concerning which he shall be so examined as a witness, and

“ shall upon such his examination make a true discovery of:
 “ And if any person who shall be thought likely to make
 “ such discovery, being summoned by the said justices, re-
 “ fuse to appear, or to be examined as a witness, he may
 “ be committed by the said justices to the county gaol, till
 “ he shall submit to be examined. Provided, That no per-
 “ son shall be questioned for any offence against the statute,
 “ unless he be proceeded against within six months after the
 “ offence committed.”

† *Self.* 2. And it is enacted by the Black Act, 9 Geo. 1. c.

For the surren-
 der clause to
 which offenders
 against this act
 are liable, vide
 post. c. 49. §. 3.
 and it is at the
 option of the
 prosecutor in
 what court he
 will prosecute
 upon this act. Black. 733.

72. That if any person or persons shall unlawfully and mali-
 ciously kill, maim, or wound any cattle; (1) or shall forcibly
 rescue any person in lawful custody for the same; or shall by
 gift, or promise of money, or other reward, procure any of
 the king's subjects to join him or them in such unlawful act;
 every person so offending shall suffer death, without the be-
 nefit of clergy. And by 27 Eliz. c. 13. the hundred are lia-
 ble to the amount of 200 l.

(1) On an indictment upon this statute, for killing a mare and a *hone colt*, it was objected in arrest of judgment. First, That the word cattle did not necessarily include *horses, mares, and colts*. And Secondly, That the mare and colt were not averred to be cattle within the statute. The judges unanimously agreed, that, as the 22 & 23 Car. 2. c. 7. had made the offence of killing horses by night a single felony, the 9 Geo. 1. c. 22. was to be considered as an extension of that act, and the offender had judgment of death. 2 Black. 732. 1 Burn. 228.

O. B. 1785,
 No. 32.
 Ibid. No. 376.

† *Self.* 3. And it is further enacted by 14 Geo. 2. c. 6. explained by 15 Geo. 2. c. 34. That whoever shall feloniously drive away, or in any other manner feloniously steal, one or more, sheep, bull, cow, (2) ox, steer, bullock, heifer, calf, or lamb, but no other cattle whatsoever; or shall wilfully kill the same with a felonious intent to steal the whole carcase, or any part thereof; or shall assist or aid to commit the said offence, shall suffer death without benefit of clergy.—And by par. 2. a reward of 10 l. shall be paid by the sheriff for taking and convicting the offenders.

(2) At Warwick summer assizes, 1774, Cooke was indicted upon this statute for stealing a *cow*, on the evidence it appeared to be a beast of the ox kind, called a *heifer*; never having had a calf. All the judges (abbate De Grey, C. J.) were of opinion, that the word heifer is mentioned in the act in contradistinction to a cow; and, therefore, that the evidence did not support the indictment. M.S.

† *Self.* 4. And by the 37 Hen. 8. c. 6. whoever shall maliciously, unlawfully, and willingly cut out, or cause to be cut out the tongue or tongues of any tame beast or beasts of any other person or persons, the said beast then being in life, shall forfeit treble damages to the party grieved, by action of trespass, and ten pounds to the king, in the name of a fine. (3)

(3) By 9 Geo. 3. c. 39. §. 10. The crown is empowered to prevent the importation of cattle, in order to avoid the danger of introducing a contagious distemper. And by 21 Geo. 3. c. 67. Regulations and penalties are imposed to prevent the mischiefs which may arise from the improper driving of cattle through the streets within the bills of mortality. And for further particulars vide 18 Car. 2. c. 20. *Cattle* 2. c. 7. 32 Car. 2. c. 2. 3 Geo. 3. c. 10.

Sett. 5. But the practice of stealing horses, cows, &c. *Preamble.* greatly increasing, owing to the facility with which they are disposed of to persons who keep places for slaughtering: it is enacted by the 26 *Geo.* 3. c. 71. "that no person shall use any place, for slaughtering any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, not be killed for butchers meat, without first taking out a licence, at the general quarter sessions; which shall only be granted upon a certificate, under the hands and seals of the minister and churchwardens, or overseers, or the minister and two substantial householders of the parish, that the person to be licenced is fit to be trusted with such business: which licence in case of death, shall be effectual to the widow, or personal representative of such person until the then next ensuing general quarter sessions."

Persons keeping a slaughter house, to take out a licence, &c.

Sett. 6. "And every such licence shall be signed by the justices in sessions, and a copy entered in a book by the clerk of the peace, for every person to search.—And persons so licenced shall affix over the door where they carry on the business, THEIR NAMES, with the words LICENCED FOR SLAUGHTERING HORSES, PURSUANT TO AN ACT PASSED IN THE TWENTY-SIXTH YEAR OF HIS MAJESTY KING GEORGE THE THIRD."

Persons licenced to affix to their houses the words herein mentioned.

Sett. 7. "And every occupier of such licenced slaughtering house shall, six hours previous to the killing any cattle, not killed for butchers meat, and previous to the fleaving any cattle, brought there dead, give notice, in writing, to the inspector, that he may, take the height, age, colour, and particular marks of every horse, mare, gelding, foal or filly, ass or mule, and the colour and particular marks of every cow, bull, heifer, ox, calf, sheep, hog, goat, or other cattle, brought alive or dead for the purposes aforesaid.—And no cattle shall be slaughtered, &c. but between eight in the morning and four in the evening, from *October* to *March*; and between six in the morning and eight in the evening, from *April* to *September*."

Previous notice to be sent when horses, &c. are intended to be slaughtered, to the inspector, who is to take an account of the beasts.

Times of slaughtering, &c.

Sett. 8. And further, "that every person so licenced, shall enter the name, place of abode and profession of the owner and of the person who shall bring the same, and the reason why the same is brought, for the examination of the inspector.—And such licenced person shall attend with such entry, before any one justice for the county, or place when required, and shall likewise produce the same at every quarter sessions."

Accounts to be kept, by the owners of slaughtering houses, of the owners of the cattle brought, &c.

Sett. 9. And "that parishioners, intitled to chuse parish officers, shall, annually, or oftener, appoint one or more persons to inspect every such slaughtering house, and take such account thereof as before directed; and make an entry thereof
"for

Vestry to appoint inspectors

Inspectors duty. “ for publick inspection. And the inspector shall affix over his
 “ door, HIS NAME, and INSPECTOR OF HOUSES AND PLACES
 “ FOR SLAUGHTERING HORSES.—In case such inspector have
 “ reason to believe, that such cattle, is in a serviceable state, or
 “ be stolen, or unlawfully come by, he shall prohibit the slaugh-
 “ tering for eight days ; and cause an advertisement to be insert-
 “ ed in some publick newspaper circulated in the country, twice
 “ or oftener, unless the owner shall sooner claim the same, or
 “ otherwise satisfactorily inform the inspectors, that they sent the
 “ cattle, to be slaughtered.—The expence to be paid by the oc-
 “ cupier of the slaughtering house, and on refusal, and conviction,
 “ on the oath of the inspector, before one justice, he shall forfeit
 “ double.”

Inspectors may visit slaughtering houses at all times. *Sec. 10.* And, par. 6. “ Every inspector in the day, and in
 “ the night, in the presence of a constable, may inspect any
 “ slaughtering house.”

Persons bringing cattle refusing to give an account of themselves, &c. may be carried before a justice. *Sec. 11.* And par. 7. “ If any person shall offer to sale, or
 “ bring any cattle to any such slaughtering house, and shall not
 “ be able, or refuse to give a satisfactory account how the same
 “ came into their possession ; or if there shall be reason to sus-
 “ pect that such cattle are unlawfully obtained, he may be con-
 “ veyed before a justice ; and if such justice shall suspect that
 “ such cattle are unlawfully obtained, he shall commit such per-
 “ son, not exceeding six days, to be further examined ; and if
 “ upon either examinations, such justices shall be satisfied, that
 “ such cattle are illegally obtained, the justice shall commit the
 “ offender to the common gaol or house of correction, to be
 “ dealt with according to law.”

Persons slaughtering horses, &c. without licence, &c. guilty of felony. *Sec. 12.* “ And if any person keeping such house, shall
 “ slaughter any cattle, other than for butchers meat, or shall
 “ flea any cattle, brought dead, without such licence, or giving
 “ notice as aforesaid, or shall kill, or slay the same, other than
 “ within the hours limited, or shall not delay slaughtering, ac-
 “ cording to the direction of such inspector, each person so
 “ offending shall be guilty of A FELONY, and punished by fine
 “ and imprisonment, and such corporal punishment, publick or
 “ private whipping, or shall be transported not exceeding seven
 “ years, as the court shall direct.”

Persons destroying hides, &c. to be deemed guilty of misdemeanors. *Sec. 13.* “ If any person keeping such house shall, immerse,
 “ in lime, or any preparation thereof, or rub therewith, or with
 “ any other corrosive matter, or destroy or burn the hide or
 “ skins of any cattle by him slaughtered, killed, or slayed, or shall
 “ be guilty of any offence against this act, for which no punish-
 “ ment is expressly provided, such person shall be guilty of A
 “ MISDEMEANOR.”

TER THE FORTY-SEVENTH.

OFFENCES BY PURVEYORS.

IENTLY the king's court was supplied with
 effaries from the ancient demesnes of the crown,
 re manured for that purpose, and in respect thereof
 s of those lands had many privileges, which they
 ; but this method being found to be troublesome and
 ent, was by degrees disused, and afterwards the
 to appoint certain officers to buy in provisions for
 ld, who were called purveyors, and claimed many
 by the prerogative of the crown, and seem to have
 e-emption of all such victuals as were brought by
 sell again.

2 Inst. 453.

Noy 101.

. By *magna charta*, chapter 21. "The king shall
 e the timber of any person against his will, and by
 ubsequent statutes, several offences of purveyors
 ade felonies, as if they took things above the value
 ve pence against the will of the owner, without war-
 r without such appraisement as was directed by those
 , or without paying for them, &c.

28 E. 1. c. 2.
 36 E. 3. c. 2, 3,
 4, 5, 6
 5 E. 3. c. 2.
 2 Inst. 82.
 Dalt. c. 107.
 Crom. 43.
 1 Bulst. 96, 97.

But these laws having been found by experience
 e sufficiently provided against the oppressions of *persons*
r making provisions for the king's household, carriages, and
ryance for his majesty, and several counties having
 nselves obliged to submit to sundry rates and taxes,
 ositions to redeem themselves from such vexations
 ssions, as it is recited by 12 Car. 2. c. 24. s. 12. it
 ed by the said statute, "That from thenceforth no sum
 f money, or other thing shall be taken, raised, taxed,
 imposed, paid, or levied, for or in regard of any
 n, carriages, or purveyance for his majesty, his
 r successors."

Moor 762.
 770, 778.
 Noy 101.

1 Hale 644.

. And it is farther enacted by the said statute, par-
 hat no person or persons by any warrant, commission,
 ority under the great seal, or otherwise by colour of
 or making provision or purveyance for his majesty,
 queen of England for the time being, or of any the
 n of any king or queen of England for the time be-
 that shall be, or for his, their, or any of their hous-
 ial take any timber, fuel, cattle, corn, grain, malt,
 raw, victual, cart, carriage, or other thing what-
 of any the subjects of his majesty, his heirs or suc-
 without the free and full consent of the owner or

1 Comm. 287.
 4 Comm. 116.

“ owners thereof, had and obtained without menace, or enforcement; nor shall summon, warn, take, use, or require any the said subjects to furnish or find any horses, oxen, or cattle, carts, ploughs, wains, or other carriages, for the use of his majesty, his heirs or successors, or of any queen of England, or of any child, or children of any of the kings or queens of England for the time being, for the carrying the goods of his majesty, his heirs or successors, or the said queens, or children, or any of them, without such full and free consent as aforesaid; any law, statute, custom, or usage to the contrary notwithstanding.”

4 Comm. 417,
432.

Stat. 5. And it is farther enacted, par. 14. “ That no pre-emption shall be allowed or claimed in the behalf of his majesty, or of any of his heirs or successors, or of any of the queens of England, or of any of the children of the royal family, for the time being, in market or out of market, but that it be free to all and every the subjects of his majesty, to sell, dispose, or employ his said goods to any other person or persons, as him listeth; any pretence of making provision or purveyance of victual, carriages or other thing for his majesty, his heirs, or successors, or of the said queens, or children, or any pretence of pre-emption in their, or any of their behalfs notwithstanding. And if any person or persons shall make provision or purveyance for his majesty, his heirs or successors, or any the queens, or children aforesaid, or impress, or take any such carriages, or other things aforesaid, on any pretence or colour of any warrant aforesaid, under the great seal, or otherwise, contrary to the intent hereof, it shall be lawful for the justices of peace, or such two or one of them as dwell near, and to the constables of such parish or village where such occasion shall happen, at the request of the party grieved, to commit, or cause to be committed, the party or parties so doing and offending, to gaol, till the next sessions, there to be indicted and proceeded against for the same, &c.”

3 Comm. 287.
4 Comm. 116,
417, 432.
Both these acts
are expired, vide
11 & 12 Will. 3.
c. 13.

Stat. 6. But this absolute and universal restraint of all kinds of purveyance having been found by experience inconvenient, it was enacted by 13 & 14 Car. 2. c. 20. which has been often continued by subsequent statutes, that the officers of the navy may press carriages for the use of his majesty's navy and ordnance, according to the regulations prescribed by that statute, and the like was enacted by 1 Jac. 2. c. 10. in relation to the king's royal progresses, &c.

CHAPTER THE FORTY-EIGHTH.

OF OFFENCES BY SOLDIERS AND MARINERS:

OFFENCES by soldiers or mariners, made felony by statute, are of three kinds.—First, Wandering without a testimonial.—Secondly, Departing from the king's service without licence.—Thirdly, Destroying a ship.

Stat. 1. The first of these offences depends upon 39 Eliz. c. 17. by which it is enacted, "That all idle and wandering soldiers or marines, or idle persons which shall be wandering as soldiers or marines, shall settle themselves in some service, labour, or other lawful course of life, without wandering, or otherwise repair to the places where they were born, or to their dwelling places, if they have any, and there remain, betaking themselves to some lawful trade or course of life, as aforesaid; upon pain, That all persons offending contrary to this act, shall suffer as in case of felony, without clergy."

This sanguinary law, says Sir Will. Blackstone though in practice deservedly antiquated still remains a disgrace to our Statute Book.

Stat. 2. And it is farther enacted, "That every idle and wandering soldier or mariner, which, coming from his captain from the seas, or from beyond the seas, shall not have a testimonial under the hand of some one justice of the peace, of, or near, the place where he landed, setting down therein the place and time, where and when he landed, and the place of his dwelling or birth, unto which he is to pass as aforesaid, and a convenient time therein limited for his passage, or having such testimonial, shall wilfully exceed the time therein limited, above fourteen days: And also, as well every such idle and wandering soldier or mariner, as every other idle person wandering, as soldier or mariner, which shall at any time hereafter forge or counterfeit any such testimonial, or have with him or them any such testimonial forged, or counterfeited as aforesaid, knowing the same to be counterfeited or forged, in all these cases, every such act or acts to be felony, and the offenders to suffer, as aforesaid, without any benefit of clergy."

Stat. 3. And it is farther enacted, "That it shall be lawful for the justices of assizes, justices of gaol-delivery, and the justices of peace of every county, and all justices of peace in towns corporate, having authority to hear and determine felonies, to hear and determine all such offences in their general sessions, and to execute the offenders, which shall be convicted before them, as in cases of

"felony is accustomed, except some honest free holder, &c. will take such offender into his service for one whole year, and also be bound by recognizance of ten pounds, to keep the said person for one whole year; and bring him to the next sessions for the peace and gaol delivery next ensuing after the said year; and if any such person so retained, depart within the year, without the licence of him that so retained him, then, to be indicted, tried, and judged as a felon, and not to have the benefit of the clergy."

Stat. 4. But it is provided by the said statute, "That if any such idle and wandering person, as aforesaid, shall happen to fall sick by the way, so that by reason of his weakness he cannot travel to his journey's end within the time limited within his testimonial, no such person to be within the danger of this statute, so as he settle himself in some lawful course of life, as aforesaid, or repair as aforesaid to the place where he was born, or was last abiding, within convenient time after the recovery of his sickness, and there remain as aforesaid."

Stat. 5. And it is farther provided by the said statute, "That if such soldier or mariner repairing to his place of birth, &c. cannot get work, he shall be set to work by two justices of peace."

Stat. 6. And it is farther provided, "That if such soldier or mariner resort to some justice of the peace next adjoining to his place of landing, or to such his direct way home, and make known unto the said justice his poverty; that the said justice, upon perfect notice thereof had, may license the same soldier or mariner to pass the next and direct way to the place where he is to repair, and to limit him so much time only, as shall be necessary for his travel thither; and that in such case his licence being so made, and he pursuing the form of such his licence, shall and may, for his necessary relief in his travel, ask and take the relief that any person shall willingly give him."

3 Inst. 729.
4 Burn. 356.
4 Comm. 165.

Vide 4 Burn,
755.

† It is also enacted by 17 Geo. 2. c. 5. with an exception of the provisions of 39 Eliz. c. 17. "That all persons wandering abroad and begging, pretending to be soldiers, mariners, seafaringmen, shall be deemed rogues and vagabonds, and punished as the act directs, with whipping, imprisonment, &c."

Stat. 7. The second offence of this kind, viz. That of departing from the king's service without licence, depends upon several statutes. For it was enacted by 18 Hen. 6. c. 19. "That soldiers retained in the manner prescribed by that act, departing from their captains without licence, shall be guilty of felony;" but this statute is now of little use, because the method of retaining soldiers therein referred to, is disused.

1 Inst. 86.
5 Co. 27.
Litt. Lit. 1.
2 Inst. c. 107.
127. 134.

Stat

8. However by 7 Hen. 7. c. 1. and 3 Hen. 8. c. 5. orce, " If any soldier being no captain, immediately sed with the king, who shall be in wages and retained, ke any prest to serve the king upon the sea, or the land beyond the sea, depart out of the king's e, without licence of his captain, he shall suffer as n, without the benefit of the clergy. And all jus- of peace in every shire in England, where any offenders be taken, have power to enquire of the ssences, and the same to hear and determine, as they do of felony, trespasses, and of other offences expressed :king's commission to them made, as though the said ces were done in the same shire."

3 Inst. 86.
Dalt. c. 107.
2 And. 151.
3 Mod. 124.
See also the
other books a-
bove cited, and
1 Hale, 672, to
680.

9. And by 2 Edw. 6. c. 2. " If any soldier serving king in his wars, in any his dominions, or on the or beyond the seas, or in Scotland, depart with- licence of the lieutenant, or admiral, or captain, &c. booty, or otherwise, being in the enemy's coun- or elsewhere in the king's service, or out of any on where he shall be appointed to serve, he shall judged a felon, and excluded from his clergy; and offices of every shire where such offender shall be , may enquire of and determine the offence, &c."

3 Inst. 86.
6 Co. 67.
Vide 27 Geo. 2.
c. 9. 21 Geo. 3.
c. 65. s. 32. re-
specting the pu-
nishment of sol-
diers in the ser-
vice of the East-
India Company.
And it is decid-
ed that a milita-
ry officer in the
service of the

Company has not a right to resign his commission at all times, and under any cir-
cumstances, whenever he pleases. 4 Burrow. 2421. By 29 Geo. 2. c. 17. subjects
vice of the French king, as officers or soldiers, are guilty of felony without clergy.
the annual acts for the punishment of mutiny and desertion.

10. The third offence of this kind, viz. That of de- a ship, depends upon 22 & 23 Car. 2. c. 11. and ft. 2. c. 9. by which it is enacted, " That if any in, master, mariner or other officer belonging to ship, shall wilfully cast away, burn, or otherwise y the ship to which he belongeth, or procure the same done, to the prejudice of the owner or owners of, or of any merchant or merchants that shall load thereon, he shall suffer as a felon, without the be- of clergy, and if the offence were committed in the al's jurisdiction, shall be tried in the manner pre- d by 28 Hen. 8. c. 15."

11. Also it is further enacted by 4 Geo. c. 12. if any owner of, or captain, master, mariner, or other r belonging to any ship shall wilfully cast away, burn, orwise destroy the ship of which he is owner, or unto he belongeth, or in any manner of wise procure the to be done, to the prejudice of any person that shall this any policy of insuranc thereon, or of any man: that shall load goods thereon, he shall suffer

† *Seft.* 12. But by 11 Geo. 1. c. 29. f. 6. this clause is explained and the offenders are ousted of clergy. And it is further enacted, "That if any of the said offences be committed within the body of a county, the same shall be tried in the same manner as other felonies so committed. And if committed upon the high seas, the same shall be tried, &c. according to the directions of 28 Hen. 8. c. 15."

For the offences by masters and mariners amounting to piracy, vide 11 and 12. Will. 3. c. 7. Ante ch. 37. For the punishment of soldiers and seamen convicted of profane cursing and swearing, vide 19 Geo. 2. c. 21. 23 Geo. 2. c. 33. Ante ch. 6. f. 4. For inferior offences respecting wages and desertion, 2 Geo. 2. c. 36. 23 Geo. 2. c. 26. For the regulation of seamen's wages under certain penalties, 31 Geo. 2. c. 10. And for the inlisting of soldiers, &c. 4 Burn 212.

CHAPTER THE FORTY-NINTH.

OF OFFENCES BY HUNTERS.

3 Edw. 1. c. 20.
21 Edw. 1. c. 362.
3 Inst. 76, 77.
Dalt. c. 29.
1 Hale 656 to 659.
2 Roll. 120, 133.
Co. Lit. 370.
2 Burn 263.

IT is retited by 1 Hen. 7. c. 7. "That many great outrages, murders, insurrections and rebellions had often been occasioned by persons in great numbers with painted faces, visors, and otherwise disguised, and riotously, and in manner of war arrayed, hunting as well by night as by day;" and thereupon it is enacted, "That as often as information shall be made of any such unlawful huntings by night, or with painted faces, to any of the king's council, or to any justice of peace of the county, of any person suspected thereof, any of the same council, or justices, to whom such information shall be made, may make a warrant to arrest such person, and may also examine him of the said hunting, and of the said doers in that behalf; and if the same person wilfully conceal the said huntings, or any person with him defective therein, that then the same concealment be felony; and if he then confess the truth, and all that he shall be examined of, and knoweth in that behalf, that then the said offences of huntings be against the king but trespasss fineable, by reason of the same confession, at the next general sessions of the peace to be holden in the same county, by the king's justices of the same sessions, there to be seised. And if rescous or disobedience be made to any person, having authority to do execution or justice by any such warrant, by any person, the which so should be arrested, so that the execution of the same warrant thereby be not had, that then the same rescous and disobedience, be felony; and if any person or persons shall be convicted of any such huntings, with painted faces, visors, or otherwise disguised, to the intent

"they

“ they should not be known, or of unlawful hunting in time of night, that then the same person or persons so convicted, to have like punishment, as he or they should have, if he or they were convicted of felony.”

† *Stat. 2.* It is also further enacted by 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 22. “ That if any person or persons being armed with swords, fire arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds inclosed with any wall, pale, or other fence, wherein any deer have been, or shall be usually kept;—or in any high road, open heath, common, or down,—or shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer—or unlawfully rob any warren (a) or place where conies or hares are usually kept:—Or shall unlawfully steal or take away any fish out of any pond or river.—Or if any person or persons (*whether armed and disguised or not*) shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, fed or kept in any places in any of the king’s forests or chases, which are or shall be inclosed with pales, rails, or other fences, or in any park, paddock, or grounds inclosed, where any deer have been or shall be usually kept; (†) (1) (2) (3) (4) (5);—or shall forcibly rescue any person being lawfully in custody of any officer or other person for any the offences before mentioned;—or, if any person or persons shall by gift or promise of money, or other reward, procure any of his majesty’s subjects to join him or them in any such unlawful act; every person so offending, being thereof lawfully convicted (in any county in England) shall suffer death without benefit of clergy—but not to work corruption of blood, nor forfeiture of land or goods.”

N.B. The several facts mentioned in this act are not to be taken as being parts of the same offence; but are every of them several offences. Lord Hardwicke, B.R. H. 219.

(a) C. Eliz. 548. C. Jac. 195. 2 Bac. Ab. 614

(†) For offences relating to the destruction of fish, vide ch. 58, Appendix 3.

(1) For offences relating to cattle, vide ch. 46.

(2) For destroying of trees, vide ch. 53, app. 1.

(3) For offences by burners of houses, &c vide ch. 58, app. 4.

(4) For shooting at another, vide ch. 53, app. 5. (5) For sending threatening letters, vide ch. 58, app. 5.

† *Stat. 3.* And, “ For the more easy and speedy bringing the offenders to justice,” it is also enacted by the said statute, “ That if any person or persons shall be charged with being guilty of any of the offences aforesaid, before any two or more of his majesty’s justices of the peace of the county where the offence shall be committed, by information of one or more credible persons, on oath by them to be subscribed; the said justices shall forthwith certify under their hands and seals, and return such information to one of the principal secretaries of state; who shall lay the same, as soon as conveniently may be, before the king in his privy council; whereupon it shall and may be lawful

The surrender clause. For constructions upon a similar clause in the Smuggling act, vide the case of John Harvey, Foster 51. And post. ch. 53. Appendix 7. sect. 2.

“ for

“ for his majesty, his heirs or successors, to make his order in
 “ said privy council, thereby requiring and commanding such
 “ offender to surrender himself within the space of forty days
 “ to any of the justices of the King’s Bench, or to any one
 “ justice of the peace, to the end that he may be forthcoming
 “ to answer the offence wherewith he shall so stand charged,
 “ according to the due course of law; which order shall be
 “ printed and published in the next London gazette, and shall
 “ be forthwith transmitted to the sheriff of the county where
 “ the offence shall be committed, and shall within six days
 “ after the receipt thereof, be proclaimed by him or his offi-
 “ cers, between the hours of ten in the morning and two in
 “ the afternoon, in the market places, upon the respective
 “ market days, of two market towns in the same county, *near*
 “ the place where such offence shall have been committed;
 “ and a true copy of such order shall be affixed upon some
 “ public market place in such market towns; and in case such
 “ offender shall not surrender himself pursuant to such order
 “ of his majesty, his heirs or successors, to be made in coun-
 “ cil as aforesaid, he shall, from the day appointed for his
 “ surrender as aforesaid, be adjudged, deemed and taken to
 “ be convicted and attainted of felony, and shall suffer pains
 “ of death, as in case of a person convicted and attainted by
 “ verdict and judgment of felony, without benefit of clergy;
 “ and the court of King’s Bench, or judges of oyer and ter-
 “ miner, &c. for the county where the offence is sworn in
 “ such information to have been committed, upon pro-
 “ ducing to them such order in council, under the seal of the
 “ said council, to award execution against such offender in
 “ such manner as if he had been convicted and attainted in
 “ the said court of King’s Bench, or before such justices of
 “ oyer and terminer, or general gaol delivery respectively.”

† *Stat. 4.* And it is further enacted, par. 5. “ That who-
 “ ever shall, after the time appointed, as aforesaid, for the
 “ surrender of any person so charged upon oath, with any
 “ the offences aforesaid, be expired, conceal, abet, or suc-
 “ cour such person, knowing him to have been so charged, as
 “ aforesaid, and to have been required to surrender himself by
 “ such order, being lawfully convicted thereof, shall suffer
 “ death without benefit of clergy.”

† *Stat. 5.* But this shall not hinder any judge, justice of
 the peace, magistrate, officer, or minister of justice, from
 apprehending or securing such offender, by the ordinary
 course of law: and if he be taken and secured before the time
 of surrender, he shall have his trial by due course of law.

For the instances in which the hundred shall be liable to the amount of 200*l.* and for the previous proceedings which are necessary to intitle the party to recover, vide 7, 8, 9, and 10 sections of the act, and Douglas 704. For the rewards for apprehending an offender, vide Bk. 2. c. 13. s. 23.

† *Stat.* 6. It is enacted by 5 Geo. 1. c. 28. "That who-
 " ever shall enter into any park, paddock, or other inclosed
 " ground where deer are usually kept, and wilfully wound or
 " kill any red or fallow deer therein, without licence from
 " the owner or keeper, or shall aid or assist in the commit-
 " ting of any such offence, shall be transported for seven
 " years.

† *Stat.* 7. But by 16 Geo. 3. c. 30. (which repeals, by
 name, all former statutes, except the statute above menti-
 oned, as far as they relate to deer) it is further enacted,
 " That whoever shall course or hunt, or shall take in any
 " slip, noose, toil, or snare, or shall kill wound or destroy,
 " or shall shoot at, or otherwise attempt to kill, wound, or
 " destroy,—or shall carry away any red or fallow deer, in any
 " forest, chase, purlieu, or ancient walk, whether inclosed
 " or not, or in any inclosed park, paddock, wood, or other
 " inclosed ground where deer are, have been or shall be usu-
 " ally kept, without the consent of the owner, or without
 " being otherwise duly authorised; or shall be aiding, abet-
 " ting, or assisting therein or thereunto; every person so of-
 " fending, by coursing, hunting, shooting at, or otherwise
 " attempting to kill, wound, or destroy; or by aiding there-
 " in or thereunto, shall forfeit for every such offence twenty
 " pounds.—And every person so offending by killing, wound-
 " ing, or destroying, or by taking in any slip, noose, toil,
 " or snare, or by carrying away, or by aiding therein re-
 " spectively, shall for every deer so wounded, killed, destroy-
 " ed, taken, or carried away forfeit thirty pounds.—And if
 " the offender in any of the cases aforesaid, shall be a keeper
 " of, or person in any manner intrusted with the custody or
 " care of deer in the forest, chase, purlieu, ancient walk, or
 " inclosed park, paddock, or wood, or other inclosed place
 " where the offence shall be committed, every such offend-
 " er shall forfeit double the penalty herein inflicted on other
 " offenders.—And whoever after having been convicted of
 " any of the aforesaid offences, shall offend a second time,
 " such second offence; whether it be the same as the first
 " offence, or be any other of the aforesaid offences, shall
 " be deemed felony, and the person guilty thereof, on con-
 " viction by indictment, shall be transported for seven years.
 " —And if any offender who hath been convicted under any
 " former statute now in force for hunting and killing deer,
 " &c. shall again commit any of the offences abovemention-
 " ed, he shall be adjudged to have committed a second of-
 " fence, under the provisions and penalties of this act."—
 And, "For the more easy bringing such offenders to pu-
 " nishment, the justice before whom any person shall be con-
 " victed for the first time, shall transmit such conviction un-
 " der his hand and seal to the next quarter sessions, to be
 " filed

Holt 214, 215.
 Carth. 508, 509.
 Strange 44, 263,
 316.
 10 Mod. 243,
 341, 378.
 Farres. 129, 134.
 Salk. 542.
 C. Car. 340.
 Sess. Cal. 346.
 Gibb. Cal. 252.

The milder pu-
 nishment inflict-
 ed by this act
 has been thought
 a virtual repeal
 of the punish-
 ment inflicted by
 the black act
 above recited.
 O. B. 1784,
 1071.

“ filed among the records, by the clerk of the peace, which,
 “ or a true copy thereof, certified and subscribed by the said
 “ clerk, shall be sufficient evidence of the conviction for the
 “ first offence.”

† *Stat.* 8. It is also enacted, par. 4. “ That any one
 “ justice, on complaint of suspicion, on oath, shall, by war-
 “ rant, cause the house of the person suspected to be searched,
 “ and if any red or fallow deer, which shall have been un-
 “ lawfully killed, or the head, skin, or other part thereof,
 “ or any slip, noose, toil, snare, or other engine for the
 “ unlawful taking of deer, shall be found, to cause the same and
 “ such person so having possession; or in whose dwelling-
 “ house, out-house, garden, or other place the same shall
 “ be found, to be brought before any justice having juris-
 “ diction, and if such person shall not produce before such
 “ justice the party of whom he received the same, or satisfy
 “ such justice that he came lawfully by such deer, or the
 “ head, skin, or other part thereof, or had a lawful occasion
 “ for such noose, slip, toil, snare or other engine, and did
 “ not keep the same for any unlawful purpose, he shall for-
 “ feit not exceeding 30*l.* nor less than 10*l.* at the dis-
 “ cretion of such justice.”

And by par. 5. “ If the person in whose possession the same
 “ shall be found shall not under the provisions aforesaid, be
 “ liable to conviction, any justice having jurisdiction may
 “ summon before him every person through whose hand
 “ such deer, &c. &c. shall appear, upon the evidence gi-
 “ ven to have passed, and if the person from whom such
 “ deer, &c. &c. shall appear to have been first received,
 “ or who having had possession thereof shall not give proof
 “ to the satisfaction of such justice that he came law-
 “ fully by the same, such person shall, on every con-
 “ viction, forfeit not exceeding 30*l.* nor less than 10*l.*”

And by par. 6. “ If on the search, by warrant, no deer,
 “ &c. shall be found, and it shall appear on the oath of one
 “ witness that any person hath, or hath had any such deer,
 “ &c. &c. in his possession, and shall be reasonably sus-
 “ pected to have come dishonestly or unlawfully thereby,
 “ every such person, and all others through whose hands the
 “ same shall appear to have passed under the like suspicion, may
 “ be proceeded against, as if such deer, &c. &c. had been
 “ found in the possession, house, out-house, garden, or place
 “ of such person, on search by warrant as aforesaid.”

Stat. 9. And it is further enacted par. 7. “ That who-
 “ ever shall lay snares or other engines for the purpose of taking
 “ or killing deer, within or upon any forest, &c. or in the
 “ ring, or outer-fence, or bank, dividing the same from the
 “ adjoining lauds;—or in any inclosed park, &c. shall, for
 “ the first offence, forfeit not exceeding 10*l.* nor less than

By the grant of
 a forest, the
 game of a forest
 doth pass. Dyer
 169.

“ 5*l.*

" 5*l.* and for every other offence not exceeding 20*l.* nor
" less than 10*l.*"

Stat. 10. And it is further enacted by par. 9. " That if any
" person carrying any gun or other fire-arms, or any sword,
" staff, or other offensive weapon, shall come into any fo-
" rest, chase, purlieu, or ancient walk,—or into any inclosed
" park, paddock, wood, or into any other ground where deer
" are usually kept, be the same inclosed or not inclosed, with
" an intent unlawfully to shoot at, course, or hunt, or to
" take in any slip, noose, toil, snare, or other engine, or
" to kill, wound, destroy or take away, any red or fallow
" deer, it shall be lawful for every ranger or keeper, or per-
" son intrusted with the care of such deer, to seize and
" take from such person, in and upon such forest, chase,
" purlieu, ancient walk, park, paddock, wood, or other ground,
" to and for the use of the owners thereof, respectively, all such
" guns, fire-arms, slips, nooses, toils, snares, or other
" engines ; and all dogs there brought for coursing deer, in
" the same and like manner as game-keepers of manors are
" empowered by law within their respective manors, to seize
" and take dogs, nets, or other engines in the custody of per-
" sons not qualified by the laws to keep the same. And if any
" such person shall there unlawfully beat, or wound any ran-
" ger or keeper, or his or their servants, or assistants, in
" the execution of his or their offices, or shall attempt to rescue
" any person in the lawful custody of any such ranger, keeper,
" servant, or assistant, every person so offending on con-
" viction by indictment, shall be transported for seven years."

Transportation.

Dogs and en-
gines may be
seized.

CHAPTER THE FIFTIETH.

OF OFFENCES BY DESTROYING FENCES, TURNPIKE-GATES, AND BRIDGES.

(F E N C E S .)

† IT is enacted by 13 Edw. 1. st. 1. c. 46. " That
" where sometime it chanceth that one having
" right to approve, doth then levy a dyke or an hedge,
" and some by night, or at another season, when they suppose
" not to be espied, do overthrow the hedge or dyke, and it
" cannot be known by verdict of the assize or jury who did
" overthrow the hedge or dyke, and men of the towns near
" will not indict such as be guilty of the fact, the towns near
" adjoining shall be distrained to levy the hedge or dyke at
" their own cost, and to yield damages."—And by 3 & 4
" Edw. 6. c. 6. such person as shall bring an assize thereupon,
" and

Vide a critical
commentary upon
this act, 2
Inst. 473. See
also cases upon
it, Skinner 93.
C. Car. 231.
440, 570.
Dyer 47, 316,
330.
4 C. 18.
11 C. 74.
1 Roll. 365.

“ and have judgment to recover, shall have his damages
“ trebled, by the judgment of the court.”

For the mode in
which the jus-
tices are directed
to proceed, vide
the act, and
ante ch. 49.

† *Stat.* 2. And it is farther enacted by 6 Geo. 1. c. 16.
“ That whoever shall break down, throw down, level, or de-
“ stroy any hedges, gates, posts, stiles, railing, walls, fences,
“ dykes, ditches, banks, or other inclosures of such woods,
“ wood-grounds, parks, chases, or coppices, plantations,
“ timber trees, fruit or other trees, thorns or quicksets, shall
“ by 6 Geo. 1. f. 2. c. 48. be committed to the house of cor-
“ rection for three months, and where there are no houses of
“ correction, to any other prison of the county or place for
“ four months, and whipped, and on conviction, by two jus-
“ tices in open sessions; and such lords of manors, owners
“ and proprietors of the same, that is, are, or shall be
“ damaged thereby, shall have the remedy and satisfaction
“ from the adjoining parishes and places as is given by the
“ above recited act of 13 Edw. the First.”

† *Stat.* 3. And it is further enacted by 16 Geo. 3. c. 30. f. 8.
“ Whoever shall wilfully pull down or destroy, or cause to be wil-
“ fully pulled down or destroyed, the pale or pales, or any part of
“ the walls of any forest, chace, purlieu, ancient walk, park, pad-
“ dock, wood, or other ground where any red or fallow deer shall
“ be then kept, without the consent of the owner, or person
“ chiefly intrusted with the custody thereof, or being other-
“ wise duly authorised, shall forfeit and pay the sum of thirty
“ pounds, on information upon oath before one justice, by
“ one witness, &c. and whoever having been convicted shall
“ offend a second time, shall on conviction by indictment, be
“ transported for seven years, provided the prosecutions be
“ within six months.”

† *Stat.* 4. By 9 Geo. 3. c. 29. f. 3. “ Whoever shall
“ wilfully or maliciously demolish, pull down or otherwise
“ destroy or damage any fence made for dividing or inclosing
“ any common, waste, or other lands or grounds in pursuance
“ of any act of parliament, or shall cause or procure the same
“ to be done, he shall be guilty of felony, and transported for
“ seven years. Prosecution to be commenced in 18 months
“ after the offence committed.”

(TURNPIKE - G A T E S .)

Vide 13 Edw. 1.
f. 1. c. 46.
1 Geo. 1. f. 2.
c. 47.
6 Geo. 1. c. 16.
4 Comm. 144.

† *Stat.* 5. It is enacted by 1 Geo. 2. f. 2. c. 19. “ That
“ if any person or persons shall, either by day or night, wil-
“ fully and maliciously break down, cut down, pluck up,
“ throw down, level, or otherwise destroy any turnpike-gate,
“ any posts, rails, wall, or other fence, belonging to any such
“ turnpike-gate erected to prevent passengers from passing
“ by without paying the toll directed to be paid by any act
“ of

" of parliament, such offender, on the oath of one witness,
 " before two justices, or at sessions, shall be sent to the com-
 " mon gaol or house of correction, to hard labour, for three
 " months, and be once publicly whipped."

† And it is farther enacted by the said statute, 1 Geo. 1. c. 19.
 and by 5 Geo. 2. c. 33. " That on conviction of the said of-
 " fence, by indictment before justices of assize, oyer and termi-
 " ner, or gaol delivery for the county, &c. the offender shall be
 " transported for seven years; and that if such offender so con-
 " victed, commit any of the offences aforesaid a second time,
 " or if any person or persons shall either by day or night, wil-
 " fully and maliciously pull down or demolish any house or
 " houses, erected for the use of any turnpike-gates, such of-
 " fender, on conviction by indictment, before justices of as-
 " size, or gaol delivery, shall be guilty of felony, and trans-
 " ported for seven years. Provided, in both cases, the pro-
 " secution be within six months."

† *Sec.* 6. It is also enacted by 5 Geo. 2. c. 33. " That Vide B. 2. c. 33.
tit. transporta-
tion.
 " if such offender shall return from transportation, as aforc-
 " said, he shall suffer death without clergy.

† *Sec.* 7. And it is also enacted by 8 Geo. 2. c. 20. N. B. The 27
Geo. 2. c. 16.
makes 5 Geo. 2.
c. 33. 8 Geo.
2. c. 20. per-
petual.
 " That whoever shall be guilty of the offences abovementi-
 " oned, or if any person or persons shall destroy, &c. any
 " chain, bar, or other fence or fences belonging to any such
 " turnpike-gate or gates as aforesaid, or any other chain,
 " bar, or fence of any kind whatsoever, set up or erected to
 " prevent passengers from passing without paying toll by act
 " of parliament, or shall forcibly rescue any person or per-
 " sons, being lawfully in custody of any officer or other per-
 " son for any of the offences before mentioned, such offender
 " shall suffer death without clergy—*Vide* further provisions by
 " this act."

† *Sec.* 8. By 13 Geo. 3. c. 84. f. 42. 7 Geo. 3. c. 40.
 " or persons shall commit any of the offences aforesaid, or
 " destroy any crane, machine or engine made or erected on
 " any turnpike road, by authority of parliament, for weigh-
 " ing waggons, carts, or carriages, or shall forcibly rescue,
 " &c. such offender shall be transported for seven years, or
 " committed to prison, not exceeding three years, at the
 " discretion of the court; and unless the offender be convict-
 " ed within twelve months, the hundred shall make satisfac-
 " tion for the damages done."

(BRIDGES.)

† *Sec.* 9. It is enacted by 9 Geo. 1. c. 29. f. 6. for pre- And the same is
enacted by 31
Geo. 2. c. 10.
f. 6. respecting
 " venting the wilful and malicious damaging or destroying West-
 " minster-bridge, or any part thereof, " That if any person or
 " Vol. I. O " perious

London bridge, “ persons shall wilfully and maliciously blow up, pull down, or
and by 12 Geo. 1. c. 36. s. 3. re- “ destroy the said bridge, or any part thereof, or attempt so
specting Fulham “ to do, or unlawfully and without authority remove or take
Bridge.—But “ away any works thereto belonging, or in any wise direct or
by 20 Geo. 2. c. 22. the dis- “ procure the same to be done, whereby the said bridge, or
tinction of Wals- “ the works thereof may be damaged, or the lives of the
ton bridge. By “ passengers endangered, such offender or offenders shall be
23 Geo. 2. c. 37. “ adjudged guilty of felony, and suffer death *without* benefit
of Hampton- “ of clergy.”
court bridge. By
24 Geo. 2. c. 36.
of Ribble bridge. By 28 Geo. 2. c. 45. of Sandwich bridge. By 29 Geo. 2. c. 86. of Blackfriars’
bridge. By 29 Geo. 2. c. 73. of Urfe bridge. By 30 Geo. 2. c. 59. of Jeremiah’s Ferry. By 30
Geo. 2. c. 63. and 31 Geo. 2. c. 48. of Old Brentford bridge, and by 31 Geo. 2. c. 59. of Trent bridge,
is made single felony, and *within* the benefit of clergy.

CHAPTER THE FIFTY-FIRST.

OF OFFENCES BY GAOLERS.

BY 14 Edw. 3. c. 10. “ If any keeper of a prison, or under-
1 Hale 640, 641, “ keeper, by too great dures of imprisonment, and by
601. “ pain, make any prisoner that he hath in his ward, to become
S. P. C. 36. C. “ an appellor against his will, he is guilty of felony.” And
3 Inst. 91. “ it is said to be no way material, whether the approvement be
2 Inst. 589, 381. true or false, or whether the appellee be acquitted or con-
demned; but at law this offence was esteemed a misprison
only, unless the appellee were hanged by reason of the
appeal.

GAOLERS, as well *de facto* as *de jure*, are liable to attachment for contempt of court, and to fine, imprisonment, and forfeiture of office for gross and palpable abuses; as in treating criminals with barbarity, extorting money, not making lawful deliverance, or suffering them to escape. 4 Ed. 3. c. 10. 2 Inst. 43, 53, 381. Co. Lit. 233. 4 Co. 44. 9 Co. 50. Ray. 216. Lev. 71. 2 Hawk. 151. 3 Mod. 143. And if death be the consequence of their harsh treatment, it is felonious homicide. 3 Inst. 91. Fost. 321. By the 3 Hen. 7. they must certify the names of their prisoners at every goal delivery, in order to be calengered. By 19 Hen. 7. c. 10. they are liable to heavy fines for suffering the escape of prisoners committed for suspicion of high or petit treason. 12 Mod. 226. By 22 and 23 Car. 2. c. 13. debtors and felons are to be separately lodged on forfeiture of office and treble damages. By 8 and 9 Will. 3. c. 27. to suffer an escape by bribery, 500l. loss of office, and disability, &c. vide post. 119. 3 Lev. 288. Ray. 216. By 3 Geo. 1. c. 15. they are restrained from purchasing the office, penalty 500l. &c. By 9 Geo. 1. c. 22. 11 Geo. 1. c. 22. to neglect or refuse to execute process in the manner directed by the act, 200l. &c. By 5 Geo. 2. c. 30. to suffer a bankrupt to escape 500l. By 2 Geo. 2. c. 22. and 21 Geo. 2. c. 33. to carry a prisoner for debt to goal against his will within 24 hours after he is taken, to exact any gratuity from, or to force any expence upon him, to purloin his bedding, apparel, &c. or to refuse him or his friends a copy of the clauses of this act to read, &c. incurs an additional penalty of 50l. and the offender may be indicted for the misdemeanour. By 24 Geo. 2. c. 40. to permit spirituous liquors to be sold in the goal 100l. By 27 Geo. 2. c. 17. the king’s bench is vested in the crown, and the marshal made liable, &c. By 32 Geo. 2. gaolers guilty of extortion may be punished in a summary way, and for disobeying the injunctions of the act forfeit 20l. and treble costs. By 14 Geo. 3. c. 59. to disobey an order of justice, made pursuant to the act is liable to fine at the discretion of the judges of assize, or the justices in sessions. See also 12 and 12 Will. 3. c. 19. 24 Geo. 3. c. 54. and 47. and 3 Mod. 143, 11 Mod. 51, 79, 80. 12 Mod. 227. 2 Rol. Ab. 76. Jenk. 231. For the *acts of gaolers* vide 2 Geo. 2. c. 22. 3 Geo. 2. c. 27. 8 Geo. 2. c. 24. 21 Geo. 2. c. 33. 32 Geo. 2. c. 28.

CHAPTER THE FIFTY-SECOND.

OF OFFENCES BY TRANSPORTERS
OF SHEEP OR WOOL.

BY some old statutes, and 13 & 14 Car. 2. c. 18. the exportation of wool was made felony; but by 7 & 8 3 Inf. c. 5, 96. Will. 3. c. 28. it is reduced to a misdemeanor only, and 4 Comm. 154. it is subjected to severe penalties by many late statutes.

Sect. 2. It is enacted by 8 Eliz. c. 3. "That no person or persons shall bring, deliver, send, receive, or take, or procure to be brought, delivered, sent, or received into any ship or bottom, any rams, sheep or lambs, or any manner of other kind of sheep, being alive, to be carried and conveyed out of this realm of England, Wales, or Ireland, or out of any of the king's dominions, on pain that every such person or persons, their aiders, abettors, procurers and comforters, shall for the first offence forfeit all his goods for ever, whereof the one moiety shall be to the king, the other moiety to him that will sue for the same." And further, "That every such offender shall suffer imprisonment by the space of one whole year, without bail or mainprize, and at the year's end, shall in some open market-town, in the fulness of the market, on the market-day, have his left hand cut off, and that to be nailed up, in the openest place of such market; and that every person or persons estfoons offending against this statute, shall be adjudged a felon, &c."

† *Sect. 3.* It is enacted by 12 Car. 2. c. 32. "That whoever shall export, or cause to be exported any sheep or wool whatsoever; or pack or load, or cause to be packed or loaded upon any horse, cart or other carriage; or load on board, or cause to be loaded on board any ship or other vessel, any sheep or wool, whatsoever, to the intent and purpose to export, or cause the same to be exported, shall forfeit the same, and twenty shillings for every sheep, and three shillings for every pound of wool. And the owners of the ship, knowing such offence, shall forfeit all their interest therein, with the apparel and furniture thereto belonging. And the master and mariners knowing thereof, and willingly aiding in such offence, shall forfeit all their goods and chattels, and have imprisonment for three months. And if any merchant or other person who shall be guilty, shall be disabled to sue in law. And by 9 & 10 Will. 3. c. 40 s. 9. prosecutions may be com-

Vide 6 Geo. 1. c. 21. 11 Geo. 2. c. 21. where by discoverers are indemnified.

Vide 13 and 14 Car. 2. c. 18 s. 7. for the penalty of passing wool into packages, and laying it in places convenient for exportation.

“ menced by the informer within one year, and by the crown
“ within three years after the offence committed.”

† *Stat.* 4. Also, by 7 & 8 Will. 3. c. 28. s. 10. “ Who-
“ ever shall be aiding in exporting any wool out of this
“ realm shall suffer three years imprisonment, and the owner
“ and aider shall pay treble the value of what the inhabitants
“ shall be liable to, (vide s. 9.) as also treble costs of
“ suit.”

† *Stat.* 5. And it is also enacted by 4 Geo. 1. c. 11.
“ That whoever shall be in prison for want of sufficient
“ bail for the unlawful exportation of wool, or by 12 Geo. 2.
“ c. 21. s. 27. for aiding or abetting therein, and shall re-
“ fuse to appear or plead to a declaration or information to
“ be delivered to such person or persons, or to the gaoler,
“ keeper, or turnkey of the prison at the prison for the said
“ offence, by the space of one term, judgment shall be en-
“ tered against him by default, and in case judgment shall be
“ so obtained, or by verdict or otherwise, and the defendant
“ shall not pay the sum recovered for the said offence within
“ three months after entering up of such judgment, the court
“ before whom such judgment shall be obtained, shall by or-
“ der of court, cause such offender to be transported for seven
“ years, and if he return before the expiration thereof, he
“ shall suffer death without clergy.

† *Stat.* 6. And it is further enacted by 12 Geo. 2. c. 71. s. 25,
26. “ that whoever shall offer or promise to give any bribe to
“ an officer of the customs, excise or salt, to connive at or per-
“ mit, the transportation or the concealment of any wool, or
“ the removing thereof contrary to this act, or any other
“ made against the transportation thereof; or to do, conceal,
“ or connive at any other act whereby any of the provisions
“ made by this or any other law, as aforesaid, may be evaded
“ or broken, shall forfeit, whether the offer or promise were
“ accepted or not, the sum of three hundred pounds to the in-
“ former. — And it is further enacted, par. 26. that if any officer
“ of the customs, excise or salt, or any other person who shall
“ act in their aid or assistance, in putting this act in execu-
“ tion, shall be hindred, opposed, obstructed, molested,
“ wounded or beaten, in seizing any wool, the offenders,
“ their aiders and abettors, or any other person or persons
“ whatsoever being armed with offensive arms or weapons, or
“ wearing any vizard, mask, or other disguise, who shall re-
“ scue, or attempt to rescue any wool which shall be seized by
“ any officers as aforesaid, shall be transported for any term
“ not exceeding seven years, as the court shall think fit.

Continued by 22
Geo. 3. c. 51.

† *Stat.* 7. Also it is further enacted by 19 Geo. 2. c. 34-
s. 6. “ That if any persons armed, to the number of three or
“ more

“ more shall be assembled to assist in the illegal exportation
 “ of wool prohibited to be exported, or in carrying of wool
 “ in order to exportation, or in rescuing the same after seizure;
 “ or in rescuing an offender herein, or preventing his
 “ being apprehended; or shall be aiding in any of the premises;
 “ or if any person shall have his face disguised when passing with such goods, or shall forcibly hinder or assault
 “ any officer in seizing the same, or dangerously wound any
 “ such in attempting to go on board any vessel, or shoot at
 “ or wound him when on board in the execution of his office;
 “ shall be guilty of felony without benefit of clergy.”

N. B. There are several other felonies in this act against smugglers, for which vide appendix the sixth.

4 Burn. 418, for a full account of this title.

CHAPTER THE FIFTY-THIRD.

OF OFFENCES BY SERVANTS.

IT is recited by 33 Hen. 6. c. 1. “ That divers household-servants, as well of lords, as of other persons of good degree, had then of late, shortly after the death of their said lords and masters, violently and riotously taken and spoiled the goods which were of their said lords and masters at the time of their death, and the same distributed among themselves;” and thereupon it is enacted, “ That after
 “ information made to the chancellor by the executors of any
 “ such person, or two of them, of such riot, taking, and
 “ spoil; the chancellor, by the advice of the two chief justices,
 “ and chief baron, or two of them, may make out writs to
 “ such sheriffs as shall be thought necessary, commanding
 “ them to make such proclamation, as by the said statute is
 “ directed, for the offenders to appear in the King’s Bench
 “ at such a day, whereupon, if they make default, they shall
 “ be attainted of felony; but if they appear, they shall be
 “ committed or bailed, till they have answered the said executors in such actions, which the said executors will declare against them, or any of them, for the riot, taking,
 “ and spoiling aforesaid.”

Ante 97.

1 Hale 667.

4 Burn 118.

This was a process much in use in case of great offences, especially about this king’s reign, to convict men sometimes in civil offences, sometimes in cases criminal upon default of a person, at the return of the proclamation.

1 Hale 654.

3 Inst. 104.

† By 6 Ann c. 31. “ If any menial or other servant, through negligence or carelessness shall fire, or cause to be fired any
 “ dwelling house or out-house, they shall forfeit 100l. on
 “ conviction by one witness, before one justice, or suffer
 “ eighteen months imprisonment, &c.”

Ld. Ray. 99.

See also 12 Geo. 3. c. 73. s. 35. 14 Geo. 3. c. 78. s. 84. And for offences by servants in particular branches of trade, vide 4 Burn 118.

CHAPTER THE FIFTY-FOURTH.

OF OFFENCES BY EGYPTIANS.

BY 1 & 2 Ph. & Mar. c. 4. "All outlandish persons, 3 Inst. 102.
 "called Egyptians, being of the age of thirteen years, Vide 22 Hen. 8. c. 10.
 "who shall be transported into this realm of England or Wales; The 5 Eliz. c. 20, recited in the former edition, is repealed by 23 Geo. 3. c. 51, as a law of excessive severity, vide 4 Comm. 4, and
 "and continue within the same by the space of one month, shall forfeit forty pounds, &c.—" And by 17 Geo. 2. c. 5. "All persons pretending to be gypsies, or wandering in the habit or form of Egyptians shall be deemed rogues and vagabonds, and suffer corporal punishment and imprisonment, in the manner the act directs."

for the history of this extraordinary class of people, 4 Comm. 165.

CHAPTER THE FIFTY-FIFTH.

OF OFFENCES BY CUTTERS OF POW-DIKE,
AND DESTROYERS OF SLUICES, &c. ON
NAVIGABLE RIVERS.

IT is recited by 22 Hen. 8. c. 11. which was repealed 4 Comm. 243.
 "by 1 Edw. 6. and revived by 2 & 3 Ph. & Mar. c. 19.
 "That divers persons had maliciously at sundry times cut down, and broken up, divers parts of the dike, called the new Pow-dike, in Marshland, in the county of Norfolk, and the Broken-dike, otherwise called Oldfelde-dike, by Marshland, in the Isle of Ely, in the county of Cambridge: By reason whereof the ground within the country of Marshland in the counties aforesaid, had been many times drowned; and the inhabitants had not only been put to great charges and expences, but also had lost much cattle, and also many people had been drowned in their beds." And thereupon it is enacted, "That every
 "such perverse and malicious cutting down, and breaking up of, any part or parts of the said dikes, or of any other bank, being parcel of the rind and uttermost part of the said country of Marshland, by any person or persons, otherwise than in working upon the said bank or dikes, for the repairing, fortifying, and amending of the same, shall be adjudged felony, and that the justices of peace of the said counties of Norfolk and Cambridge, within the said isle, shall have full
 "power

“ power at their sessions to cause enquiry to be made of every
 “ such offence, to award like process, judgment, and exe-
 “ cution, as they have used to do upon other felonies,
 “ being felony at common law.”

† *Stat. 2.* It is enacted by 1 Geo. 2. st. 2. c. 19. s. 2.
 made perpetual by 27 Geo. 2. c. 16. “ That whoever shall, ei-
 “ ther by day or night, wilfully and maliciously break down
 “ or demolish any lock, sluice, or floodgate erected by act of
 “ parliament upon any navigable river, for preserving or secu-
 “ ring the navigation thereof, on conviction, by indictment
 “ within six months at the assizes, may be transported for
 “ seven years.”

† *Stat. 3.* By 8 Geo. 2. c. 20. made perpetual by 27 Geo.
 2. c. 16. “ Whoever shall wilfully or maliciously pull down,
 “ pluck up, throw down, level, or otherwise destroy any lock,
 “ sluice, floodgate or other works, on any navigable river,
 “ erected by authority of parliament; or forcibly rescue any
 “ person or persons in lawful custody for the same, shall
 “ suffer death without benefit of clergy.” The offence may
 be tried in any adjacent county, but without corruption of
 blood, &c.

† *Stat. 4.* It is also enacted by the said statute, par. 2.
 “ That whoever shall wilfully and maliciously draw or pluck
 “ up any flood-gate, fixed or made in any wear or lock,
 “ erected by authority of parliament, in or upon any navigable
 “ river, for preserving the navigation thereof, on conviction
 “ by one witness, before two justices of that or of the adja-
 “ cent county, shall be sent to hard labour for one month in
 “ the house of correction;—and the hundred made liable to
 “ the amount of twenty pounds, &c.”

† *Stat. 5.* And it is further enacted by 10 Geo. 2. c. 32.
 “ That whoever shall unlawfully cut off, draw up, or remove
 “ and carry away, any piles, chalk, or other materials which
 “ shall be driven into the ground and used for the securing
 “ any marsh, or sea-walls or banks, in order to prevent the
 “ lands lying within the same, from being overflowed and
 “ damaged, shall forfeit twenty pounds; one moiety to the
 “ informer, the other to the poor; and in default, by dis-
 “ tress, shall be kept at hard labour for six months.” Any
 one justice of the place, on information upon oath, may sum-
 mon the offender to appear, or issue his warrant to apprehend
 him, and upon appearance, or non-appearance, may convict,
 on confession, or the oath of one witness.

† *Stat. 6.* And it is further enacted by the above statute,
 “ That all the provisions of the Black Act of 9 Geo. 1. c.
 “ 22. for the bringing offenders, their aiders and abettors
 “ to justice; for making compensation to the party injured;
 “ for the reward for apprehending offenders, &c. and for
 “ the more impartial punishment of the offences therein

“ mentioned ; together with all restrictions, limitations, and mitigations of the said act, shall extend to all cases of offences by breaking down, or cutting down any bank or banks of any river, or any sea-bank, whereby any lands shall be overflowed or damaged.”

† *Stat.* 7. And by 6 Geo. 2. c. 37. made perpetual by 31 Geo. 2. c. 42. “ Whoever shall unlawfully and maliciously break down, or cut down the bank or banks of any river, or any sea bank, whereby any lands shall be overflowed, or damaged, shall suffer death without clergy.”

Vide 23 Geo. 3. c. 25.

† *Stat.* 8. By 27 Geo. 2. c. 19. “ Whoever shall maliciously cut, break down, burn, demolish, or destroy any bank, mill, engine, floodgate or sluice, erected, made, supported or maintained for the purpose of benefiting the Bedford level, shall suffer death without clergy.” And further, “ Whoever shall maliciously stop, dam up, demolish, damage, or destroy any river, drain, water-course, door, dam, bridge, or other works erected for the purposes aforesaid, on conviction before two justices for the counties and isles, or either of them, shall forfeit one hundred pounds.”

† *Stat.* 9. By 4 Geo. 3. c. 12. s. 5. which recites that the laws in being were not sufficient for the preservation of banks, floodgates, sluices, and other works belonging to navigable rivers, and thereupon it is enacted “ That whoever shall wilfully or maliciously break, throw down, damage or destroy any banks, floodgates, sluices, or other works, or open or draw up any floodgate, or do any other wilful hurt or mischief to any navigation erected by authority of parliament, so as to obstruct, hinder, or prevent the carrying on, completing, supporting, or maintaining such navigation, may be transported for seven years.”

For the penalty of breaking the dams of private fisheries, vide 37 Hen. 8. c. 6. and 5 Eliz. c. 27. For obstructing and filling up any haven, road, channel, or navigable river, vide 19 Geo. 2. c. 22. Burr. 696. For offences by bum boats on the river Thames, 2 Geo. 3. c. 28. And for the prevention of thefts on navigable rivers, vide 24 Geo. 2. c. 45.

CHAPTER THE FIFTY-SIXTH.

OF OFFENCES BY TRESPASSERS ON THE BORDERS; AND RIOTERS.

4 Jac. 1. c. 1.
7 Jac. 1. c. 1.
3 Inst. 66. 67.
3 Burn. 231,
232.
4 Comm. 243.

IT is recited by 43 Eliz. c. 13. “ That then of late years many of the queen’s subjects dwelling in the counties of Cumberland, Westmorland, and the bishoprick of Durham, had been taken, some from their own houses, and other in travelling on the highway, or otherwise, and been carried away as prisoners, and kept barbarously, and cruelly, until they

they had been redeemed by great ransoms; and also, that then of late time there had been many incursions, robberies and burning and spoiling of towns, villages, and houses, within the said counties, so that divers of the queen's subjects, in the said counties, had been enforced to pay a certain rate of money, corn, cattle, or other consideration, commonly called black-mail, to divers inhabiting upon or near the borders, being men of name, and friended and allied with divers in those parts, who were commonly known to be great robbers, and spoil-takers, within the said counties, to the end thereby to be by them protected from the danger of such as used to rob and steal in those parts;" and thereupon it is enacted, " That whosoever shall at any
 " time hereafter, without good and lawful warrant or authority, take any of her majesty's subjects against his or their
 " will or wills, and carry them out of the same counties, or
 " detain, force, or imprison him or them, as prisoners, or
 " against his or their wills, to ransom them, or to make
 " prey or spoil of his or their person, or goods, upon deadly
 " feud or otherwise: or whosoever shall be privy, consenting,
 " aiding, or assisting unto any such taking, detaining or carrying away, or procure the taking, detaining, or carrying
 " away of any such person or persons prisoners as aforesaid: or whosoever shall take, receive, or carry, to the use
 " of himself, or wittingly to the use of any other, any money,
 " corn, cattle, or other consideration, commonly called
 " black-mail, for the protecting, or defending of him or
 " them, or his or their lands, tenements, goods, or chattels, from such thefts, spoils, and robberies, as is aforesaid:
 " or whosoever shall give any such money, corn, cattle, or
 " other consideration, called black-mail, for such protection
 " as is aforesaid, and shall be of the said several offences, or
 " of any of them, indicted and lawfully convicted, or shall
 " stand mute, or shall challenge peremptorily above the number of twenty before the justices of assizes, justices of gaol
 " delivery, justices of oyer and terminer, or justices of peace,
 " within any of the said counties, at some of their general
 " sessions, within some of the said counties to be holden,
 " shall be reputed, adjudged, and taken to be as felons, and
 " shall suffer pains of death, without any benefit of clergy,
 " &c."

† *Stat. 2.* By 13 & 14 Car. 2. c. 22. made a public act by 6 Geo. 2. c. 37. and perpetual by 31 Geo. 2. c. 42.
 " The justices of the peace of the respective counties of Cumberland and Northumberland, or the major part of them,
 " at any general sessions, may in open court, make an order
 " for charging the inhabitants proportionally, for the securing
 " the said several counties from the depredations of the *mosi*
 " *troopers*; so as Northumberland be not charged above 500l.
 " nor Cumberland above 200l. a year: and they may appoint
 30 men

“ 30 men in Northumberland, and 12 men in Cumberland,
 “ under respective commanders, to apprehend offenders, un-
 “ der pain of fine and imprisonment for neglect of duty. But
 “ *vide* 29 & 30 Car. 2. c. 2. which obliges the justices to
 “ take security, &c.”

For the process
 of apprehending
 offenders who
 shall escape into
 Scotland, *vide*
 13 Geo. 3. c. 31.
 And for the riot
 4th 1 Geo. 1. f. 2. c. 5. *Infra*, c. 65. f. 56.

† *Sec.* 3. By 18 Car. 2. c. 3. “ The benefit of clergy is
 “ taken away from great, known, and notorious thieves,
 “ and spoil-takers in the said counties of Northumberland and
 “ Cumberland, for theft done within the same; but the jus-
 “ tices of assize may transport them for life.”

CHAPTER THE FIFTY-SEVENTH.

OF OFFENCES BY BANKRUPTS AND IN- SOLVENT DEBTORS.

(The 4 Ann. c. 17. and 5 Ann. c. 22. recited in the former edition are expired.)

(a) There is a particular provision in the act to prevent their being maliciously sued out, but the injured trader may likewise bring an action on the case against the offender, 3 Burr. 1419.

(b) The commissioners cannot break open any but the bankrupt's house to search for concealed effects. *See* 2 Shrewsbury 247.

IT is enacted by 5 Geo. 2. c. 30. continued by 21 Geo. 3. c. 29. f. 8. “ That if any person or persons have be-
 “ come bankrupt, or who shall at any time hereafter become
 “ bankrupt within the intent and meaning of the several sta-
 “ tutes made and now in force concerning bankrupts, or any
 “ of them, and against whom a commission of bankrupt un-
 “ der the great seal of Great Britain hath been awarded and
 “ issued out, or shall at any time hereafter be awarded and is-
 “ sued out, whereupon the person or persons against whom
 “ such commission hath issued (a) or shall issue, have or hath
 “ been, or shall be declared bankrupt or bankrupts, shall not
 “ within forty-two days after notice thereof in writing, to be
 “ left at the usual place of abode of such person or persons,
 “ or personal notice, in case such person or persons be then in
 “ prison, and notice given in the London Gazette that such
 “ commission or commissions is or have been issued,
 “ and of the time and place of a meeting of the commission-
 “ ers therein named, or the major part of them, surrender
 “ him, her, or themselves to the said commissioners named in
 “ the said commission, or the major part of them, and sign
 “ or subscribe such surrender, and submit to be examined
 “ from time to time upon oath, or being the people called
 “ *quakers*, upon the solemn affirmation by law appointed for
 “ such people, by and before such commissioners, or the ma-
 “ jor part of them, by such commission authorised, and in all
 “ things conform to the several statutes already made and now
 “ in force concerning bankrupts; and also upon such his-
 “ her, or their examination, fully and truly disclose and discover
 “ all his, her, or their effects (b) and estate real and personal, and
 “ how and in what manner, to whom, and upon what considera-
 “ tion, and at what time or times he she or they have or
 “ hath disposed of, assigned, or transferred any of his, her, or
 “ their

" their goods, wares, merchandizes, monies, or other estate
 " and effects, (and all books, papers, and writings relating
 " thereto) of which he, she, or they was or were possessed,
 " or in or to which he, she, or they was or were any ways
 " interested or intitled, or which any person or persons had,
 " or hath, or have had in trust for him, her, or them, or for
 " his, her, or their use, at any time before or after the issu-
 " ing of the said commission, or whereby such person or per-
 " sons, or his, her, or their family or families, hath or have
 " or may have or expect any profit, possibility of profit, bene-
 " fit or advantage whatsoever, except only such part of his,
 " her or their estate and effects, as shall have been really and
 " *bonâ fide* sold or disposed of in the way of his, her, or their
 " trade and dealings; and except such sums of money as shall
 " have been laid out in the ordinary expence of his, her or
 " their family or families; and also upon such examination
 " deliver up unto the said commissioners by the said commis-
 " sion authorized, or the major part of them, all such part of
 " his, her, or their the said bankrupt's goods, wares, mer-
 " chandizes, money, estate and effects, and all books, papers,
 " and writings relating thereto, as at the time of such exa-
 " mination shall be in his, her, or their possession, custody or
 " power, (his, her, or their necessary wearing apparel, and the
 " necessary wearing apparel of the wife and children of such
 " bankrupt only excepted) then he, she, or they the said bank-
 " rupt or bankrupts in case of any default and wilful omission
 " in not surrendering and submitting (1) to be examined as
 " aforesaid; or in case he, she, or they shall remove, conceal, or
 " embezzle any part of such his, her, or their estate real or
 " personal to the value of twenty pounds, or any books of ac-
 " count, papers, or writing relating thereto, with an intent
 " to defraud his, her, or their creditors, (and being thereof
 " lawfully convicted by judgment or information) shall be
 " deemed and adjudged to be guilty of felony, and shall suf-
 " fer as felons without benefit of clergy, (2) or the benefit of
 " any statute made in relation to felons; and in such case
 " such felons goods and estate shall go and be divided among
 " the creditors seeking relief under such commission."

Vide Cooke's
Bankrupt laws,
chap. 6.

The Bankrupt's
wife cannot be
examined, 1 P.
Wms. 611.

(1) Vide the case
Ex parte Lin-
good, 1 Atkins
240.

(2) As this is a severely penal law, reaching the life of the bankrupt, a court of equity will not lend its aid to the prosecution, by ordering the clerk of the commission to attend at the Old Bailey with the proceedings under the commission; but the party must prove him both a bankrupt and a felon, within the meaning of the act. Cooke's Bankrupt laws 104, 106. So also in the commitment by the commissioners, the act must be strictly pursued. 1 Salk. 348. 2 Black 1144. 1 Strange 280.

† *Sec. 2.* But it is provided by the said statute, par. 3.
 " That it shall and may be lawful to and for the said chan-
 " cellor, or lord keeper, or commissioners for the custody of
 " the great seal for the time being, to enlarge the time for
 " such person or persons surrendering him, her, or themselves,
 " and *disclosing and discovering his, her, or their estate and*
 " effects

“ effects as aforesaid, as the said lord chancellor, lord keeper, or such commissioners shall think fit, not exceeding fifty days, to be computed from the end of the forty-two days, (*vide the second section of the act*) so as such order for enlarging the time be made six days at least before the time on which such person or persons was or were so to surrender him, her, or themselves, and make such discovery as aforesaid.”

Cooke's B. L. 289.
5 Mod. 309.
Comb. 391.
2 Black. 1035.
1 Ark. 204, 289.
L. Raym. 153.

† *Sec.* 3. And it is further enacted, par. 21. “ That whoever shall have accepted of any trust, and shall willfully conceal or protect any part of the bankrupt's estate and effects from the creditors, and shall not discover the same within forty-two days after the commission issues, either to the commissioners or assignees, or submit to be examined (1) by the commissioners, shall forfeit 100 l. and double the value of the property concealed.

(1) If a bankrupt absconds, or is likely to run away between the time of the commission issued and the last day of surrender, he may by warrant from any judge or justice of peace, be apprehended and committed to the county goal. 2 Comm. 481. See also Perrotti's case. Green 197, 204. Burr. 1123. Cooke's Bank. law 282, 283, 107.

† *Sec.* 4. Secondly, “ And whereas several persons who are prisoners for debt, chuse rather to continue in prison and spend their substance there, than discover and deliver up to their creditors their estates and effects,” It is therefore enacted by 28 Geo. 2. c. 13. s. 39. “ That any one or more of the creditors of any prisoner at whose suit he or she is detained in prison, upon 20 days notice in writing to such prisoner and the person in whose custody he is, to require the keeper of the prison to bring such prisoner before the justices at their next general or quarter sessions of the peace, or any adjournment thereof for the county or place, together with a copy of the cause of his detainer, and such prisoner shall then, at the request of a creditor, be obliged to deliver in upon oath, and subscribe a schedule of his estate and effects (in the manner directed by the act) to be vested, assigned, and equally divided for the benefit of his creditors, and on conviction of wilful perjury therein, or if such prisoner so brought up as aforesaid shall neglect or refuse to deliver in and subscribe such schedule within forty days, such offender shall suffer death without clergy.”

CHAPTER THE FIFTY-EIGHTH.

OF OFFENCES BY COUNTERFEITERS OF BANK-NOTES, EXCHEQUER-BILLS, STAMPS, SOUTH-SEA BONDS, LOTTERY ORDERS, &c.

To erase the usual mark made with red ink across the face of

AND first as to counterfeiters of bank-notes, it is enacted by 8 & 9 Will. 3. c. 20. s. 36. “ That the forging or counterfeiting the common seal of the governor and

“ common

" company of the bank of England, or of any sealed bank-bill, made or given out in the name of the said governor and company, for the payment of any sum of money, or of any bank-note of any sort whatsoever, signed for the said governor and company of the bank of England, or the altering or raising any endorsement on any bank-bill, or note of any sort, shall be adjudged to be felony without benefit of clergy."

a bank note, to denote that it has been paid, is erasing an indorsement within the meaning of this act, 1 Stu. 18. 3 P. Wms. 419. — So also to alter the amount of the

sum for which a bank note is made, is a forging, and counterfeiting of the bank note. 1 Str. 19. And in forging the name; the cashier whose name is signed to the note is an admissible witness to prove it forged. O. B. 1784. p. 345, 837.

† *Stat.* 2. And it is also enacted by 11 Geo. 1. c. 9. §. 6. " That whoever shall alter, forge, or counterfeit any bank-bill or note of the bank of England, or bank-note of any sort whatsoever; or shall erase or alter the same, or any indorsement thereon; or shall tender in payment, utter, vend, exchange, or barter any such altered, forged, or counterfeited bill or note, or any erased or altered bill or note, or the indorsement thereon; or shall knowingly demand to have the same exchanged for ready money, with intention to defraud, shall suffer as in *cases of felony*."

Vide the case of Rex v. Elliot, Kent Assizes, July 1777, and the case of Rex v. Dick, on the forgery of a Scotch Bank note.

† *Stat.* 3. And it is further enacted by 12 Geo. 1. c. 32. §. 9. " That whoever shall forge, or procure to be forged, or assist in forging the name or hand of any of the cashiers to any instrument or writing whatsoever, for and in order to obtain the property of any of the suitors of the court of chancery; or any instrument or writing made by any of the said cashiers with intention to defraud any person whatsoever shall suffer death without clergy."

Moore 666.
Shaw 135.

† *Stat.* 4. And it is further enacted by 15 Geo. 2. c. 13. §. 11. " That whoever shall alter any bank-note, bank-bill, dividend, warrant, bond or obligation under the common seal of the bank of England, or any indorsement thereon, or shall offer to, or dispose of, or put away the same, or shall demand the money, or any part thereof of the said company, their servants, or other person knowingly, to defraud the said company, their successors, or any other person, shall suffer death without clergy."

† *Stat.* 5. And whereas frauds have been committed by forging the notes and bills of the governor and company of the bank of England, notwithstanding the statutes now in force for punishing and suppressing the same, it is therefore enacted by 13 Geo. 3. c. 79. " That whoever (other than the officers or agents of the said company authorised, appointed and employed for that purpose) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using; or (without being authorised as aforesaid) shall knowingly have in their custody or possession (without lawful excuse, the proof whereof shall

“ lie upon the person accused) any frame, mould, or instru-
 “ ment, for the making of paper with the words *Bank of Eng-*
 “ *land* visible in the substance of such paper; or shall make
 “ or cause or procure to be made, or knowingly aid or assist
 “ in the making any paper in the substance of which the said
 “ words *Bank of England* shall be visible—or if any person
 “ (except as before excepted) shall by any art, mystery, or
 “ contrivance cause or procure the said words *Bank of England*
 “ to appear in the substance of any paper whatsoever, shall
 “ suffer death without benefit of clergy.”

† *Stat. 6.* And by par. 2. “ Whoever, without being au-
 “ thorised as aforesaid, shall engrave, cut, etch, or scrape in
 “ mezzotinto, or shall cause or procure the same to be done,
 “ or shall aid or assist in so doing, in or upon any plate of
 “ copper, brass, steel, pewter, or of any other metal, or mix-
 “ ture of metals, or upon wood or any other material, or any
 “ plate whatsoever, any promissory note, inland bill, or bill of
 “ exchange, or blank promissory note, inland bill, or bill of
 “ exchange, or part of the same containing the words *Bank*
 “ *of England*, or *Bank post bill*, or any word or words expres-
 “ sing the sum or amount, or any part of the sum or amount
 “ of such promissory note, inland bill, or bill of exchange,
 “ in white letters or figures on a black ground; or shall use
 “ any such plate so engraved, or any other instrument for
 “ the making or printing of such promissory note, &c.—or
 “ shall knowingly have in their custody any such plate or in-
 “ strument, or shall knowingly and wilfully utter any such
 “ promissory note, &c. shall be committed to the common
 “ gaol of the county or place where the offence shall be com-
 “ mitted, for any space not exceeding six months.—But this
 “ act shall not extend to persons carrying such notes for pay-
 “ ment, &c.”

† *Stat. 7.* Secondly, As to counterfeiters of exchequer-
 bills, it is enacted by 25 Geo. 3. c. 2. “ That if any person
 “ or persons shall forge or counterfeit any exchequer-bill
 “ which shall have been made forth by virtue of this act, be-
 “ fore the same shall be paid off and cancelled, or any exche-
 “ quer-bills to be received or made forth in pursuance of
 “ this act, or any indorsement or writing thereupon or there-
 “ in, or tender in payment any such forged or counterfeit
 “ bill, or any exchequer-bill with such counterfeit indorse-
 “ ment or writing thereon, or shall demand to have such
 “ counterfeit bill, or any such exchequer-bill with such coun-
 “ terfeit indorsement or writing thereon or therein, exchange-
 “ ed for ready money by any person or persons, body or
 “ bodies politick or corporate, who shall be obliged or re-
 “ quired to exchange the same, or by any other person or
 “ persons whatsoever, knowing the bill so tendered in payment
 “ or demanded to be exchanged, or the indorsement or
 “ writing thereupon or therein to be forged or counterfeited,
 “ and

"and with intent to defraud his majesty, his heirs and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politick or corporate, who shall contract to circulate or exchange the same, or any of them, or any other person or persons, body or bodies politick or corporate, then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon, and shall suffer as in cases of felony without benefit of clergy."

† *Stat.* 8. By 9 Geo. 1. c. 12. for the more easy transferring certain exchequer annuities, "Whoever shall forge or counterfeit, or shall procure, &c. or aid in the forging or counterfeiting any order made forth in pursuance of this act, or of the 6 Geo. 1. c. 11. 6 Geo. 1. c. 17. 7 Geo. 1. c. 30. 8 Geo. 1. c. 20. or any assignment of such order, or of the annuities payable thereon, or of any receipt or discharge to the exchequer for the annuities due, or to grow due on such order, or any authority to transfer such order or annuities. Or shall forge, &c. the name of any of the proprietors, &c. or shall endeavour to receive such annuities, or any part thereof, by virtue of such forged authority, or shall personate any true and real proprietor of the said orders, and receiving, or endeavouring to receive the money of such proprietor, as if such offender were the true and lawful owner thereof, shall be guilty of felony without clergy."

Vide also 4 Geo. 2. c. 9.
9 Geo. 2. c. 24.
11 Geo. 2. c. 27.

† *Stat.* 9. Thirdly, As to counterfeiters of stamps, it is enacted by 5 Will. & Mar. c. 21. s. 11. which is the first act upon the subject, "That whoever shall counterfeit or forge any stamp or mark, to resemble any stamp or mark which shall be provided or made in pursuance of this act, or shall counterfeit or resemble the impression of the same upon any vellum, parchment, or paper, thereby to defraud their majesties, their heirs and successors, of any of the duties hereby granted, or shall utter, vend, or sell any vellum, parchment or paper, with such counterfeit mark or impression thereupon, knowing such mark or impression to be counterfeited, shall suffer death without the benefit of clergy."

The following acts have also imposed stamp duties, and contain the same clause against the forging or counterfeiting of them.

5 W. and M. c. 21.
6 Will. 3. c. 6.
6 Will. 3. c. 12.
7 Will. 3. c. 35.
8 Will. 3. c. 20.
9 Will. 3. c. 25.
9 Will. 3. c. 44.
1 Ann. c. 15.

1 Ann. s. 2. c. 22. 4 Ann. c. 12. 4 Ann. c. 16. 5 Ann. c. 8. 5 Ann. c. 19. 6 Ann. c. 5.
8 Ann. c. 9. 9 Ann. c. 21. 9 Ann. c. 23. 10 Ann. c. 19. 10 Ann. c. 26. 12 Ann. s. 1. c. 2.
11 Ann. s. 2. c. 9. 1 Geo. 1. s. 2. c. 12. 3 Geo. 1. c. 9. 5 Geo. 1. c. 19. 6 Geo. 1. c. 4.
6 Geo. 1. c. 21. 11 Geo. 1. c. 8. 11 Geo. 1. c. 30. 11 Geo. 1. c. 33. 2 Geo. 2. c. 23.
9 Geo. 2. c. 32. 11 Geo. 2. c. 19. 16 Geo. 2. c. 26. 18 Geo. 2. c. 22. 20 Geo. 2. c. 45.
23 Geo. 2. c. 25. 23 Geo. 2. c. 26. 29 Geo. 2. c. 12. 29 Geo. 2. c. 13. 30 Geo. 2. c. 19.
30 Geo. 2. c. 35. 2 Geo. 3. c. 36. 5 Geo. 3. c. 35. 5 Geo. 3. c. 46. 5 Geo. 3. c. 47.
6 Geo. 3. c. 46. 7 Geo. 3. c. 44. 8 Geo. 3. c. 25. 12 Geo. 3. c. 48. 13 Geo. 3. c. 63.
16 Geo. 3. c. 34. 17 Geo. 3. c. 50. 19 Geo. 3. c. 16. 20 Geo. 3. c. 28. 21 Geo. 3. c. 26.
22 Geo. 1. c. 33. 23 Geo. 3. c. 49. 23 Geo. 3. c. 58. 23 Geo. 3. c. 67. 24 Geo. 3. c. 70.
25 Geo. 3. c. 30.

(a) One of the marks is a lion passant; if therefore an indictment describe the lion to be rampant, it is vicious, and the prisoner must be acquitted. O. B. 1786, p. 790.

By the 24 Geo. 3. c. 20. the manufactures of Sheffield are excluded from the operation of this act, under the regulation therein mentioned.

† *Sec.* 10. But by 13 Geo. 3. c. 56. "Whoever shall cast, forge, or counterfeit any mark or stamp (a) used for making of gold and silver plate, in pursuance of 12 Geo. 2. c. 26. or any other act, or shall counterfeit any stamps or impression to resemble that used by the goldsmiths company, or shall transpose the same from one piece of wrought plate to another, or to any piece of base metal, or shall sell, exchange, or expose to sale, or export out of this kingdom any wrought plate of gold or silver, or any vessel of base metal, with such counterfeited mark thereon, or any mark, stamp, or impression which shall have been transposed or removed from any other piece of plate, or be possessed of any mark or stamp which shall be forged in imitation as aforesaid, their procurers, &c. shall be transported for fourteen years.—And by 24 Geo. 3. c. 53. *sect.* 16. to commit this offence in the manner described by that act, is felony without benefit of clergy."

6 Geo. 1. c. 4. f. 56.
6 Geo. 1. c. 11. f. 50.
12 Geo. 1. c. 32. f. 9.

† *Sec.* 11. Fourthly, As to counterfeiters of South-sea bonds, it is enacted by 9 Annæ 21. c. 27. f. 51. "That if any person or persons shall forge or counterfeit the common seal of the South-sea company; or shall forge, counterfeit, or alter any bond or obligation under the common seal of the said company, or shall offer to dispose of, or pay away any such forged, counterfeited, or altered bond, (knowing the same to be such) or shall demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said company, or any of their officers, knowing the same to be forged, counterfeited or altered, with intent to defraud the said company, or any other person or persons, every such offender shall suffer as a felon without the benefit of clergy."

† By 8 Geo. 1. c. 22. "Whoever shall forge or counterfeit, or procure to be forged or counterfeited, or shall knowingly and wilfully aid or assist in the forging or counterfeiting any letter of attorney, or other authority or instrument to transfer, assign, sell, or convey any share or part thereof in any capital stock and funds of the South-sea company; or to receive any South-sea annuity or dividend, or any part thereof;—or shall forge or counterfeit, or procure to be forged or counterfeited, or shall knowingly and wilfully aid or assist in the forging or counterfeiting the name of any of the proprietors of any such share in stock, or of any persons intitled to any such annuity or dividend, or to any such pretended letter of attorney, instrument, or authority;—or shall knowingly and fraudulently demand, or endeavour to have any such share or stock, or any part thereof transferred, assigned, sold, or conveyed, or such annuity or dividend, or any part thereof to be received
" by

“ by virtue of any such counterfeit or forged letter of attorney, authority, or instrument; — or shall personate any true and real proprietor of the said shares, annuities or dividends, and thereby receive, or endeavour to receive the money for the same, as if such offender were the lawful owner thereof, shall be guilty of felony without clergy.”

† *Stat.* 12. Fifthly, As to counterfeiters of lottery orders, it is enacted by 25 Geo. 3 c. 57. “ That if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting any ticket or tickets, certificate or certificates, order or orders, made forth by virtue of this present act, or any former act made for establishing any lottery or lotteries, or altering any number, figure, or word therein, or utter, vend, barter, or dispose of any such false, altered, forged, or counterfeited ticket or tickets, certificate or certificates, order or orders; or shall bring any such forged or counterfeited ticket, certificate, or order, or any such ticket, certificate or order, the number whereof, or any figure or words therein shall have been altered (knowing the same to be such) to the said managers, or any of them, or to the cashier or cashiers, or accountant-general of the bank of England for the time being, or to any other person or persons whatsoever, with a fraudulent intention; or shall willingly aid, abet, assist, hire, or command any person or persons to commit such offence or offences as aforesaid, such offenders shall suffer death without clergy.”

† *Stat.* 13. And it is also enacted “ That the managers and directors, or any two or more of them, are authorised, required and impowered to cause any person or persons bringing or uttering such forged or counterfeit ticket or tickets, certificate or certificates, as aforesaid; or aiding, abetting, assisting, hiring or commanding any person or persons therein; to be apprehended, and to commit him, her, or them to Newgate, or to the county gaol.—And offenders (not in prison) discovering persons guilty, are intitled to a reward of fifty pounds, and a pardon.”

† *Stat.* 14. Sixthly, As to other forgeries, It is enacted, By 6 Geo. 1. c. 18. s. 13. and 14 Geo. 2. c. 37. “ Who-
“ ever shall forge or counterfeit the common seal of
“ either the London, or the Royal Exchange Assurance
“ corporations, or shall forge, counterfeit, or alter any policy, bill, bond or obligation under their common seal; or
“ shall knowingly offer to dispose of, or pay away any such
“ policy, bill, bond, or obligation; or shall demand the money for the same, or any part thereof, of or from such of
“ the same corporations as shall be mentioned or referred to
Vol. I. P “ therein,

For the offence of forging the testimonials of a justice by a warden, see ante. c. 45. s. 2.

" therein, or any of their officers, shall suffer death without clergy."

† *Stat.* 15. By 12 Geo. 1. c. 32. s. 9. " Whoever shall forge or counterfeit, &c. the name or hand of the accountant-general, register, clerk of the report-office in chancery, in order to obtain the money of any of the suitors of the said court of chancery;—or any instrument or writing made by such accountant-general, register or clerk, with intent to obtain the money as aforesaid;—or shall forge or counterfeit any bond or obligation under the common seal of the East-India company, or any indorsement or assignment thereon, or shall knowingly publish the same, with intention to defraud any person whatsoever, shall suffer death without clergy."

Vide O.B. 1784,
p. 241.
O. B. 1785,
p. 654.

† *Stat.* 16. By 2 Geo. 2. c. 25. made perpetual by 9 Geo. 2. c. 18, " Whoever shall falsly make, forge, or counterfeit, or shall cause or procure, &c. or shall wilfully act or assist in falsly making, forging, or counterfeiting any deed, (1) will, testament, bond, writing obligatory, bill of exchange, promissory note for the payment of money, indorsement or assignment of any bill of exchange, or promissory note for the payment of money, (2) or any acquittance or receipt either (3) for money or goods, with intention to defraud any person whatsoever, and by 31 Geo. 2. c. 22. s. 78. with intention to defraud any corporation whatsoever; or shall, with the like intent, knowingly utter or publish the same as true, shall suffer death without clergy."

(1) A deed, forged in the name of a person who never had existence, is within the statute; for the statute doth not use the words *the deed of any person*, or *the deed of another*, or any words of the like import, but *any deed*. Lord Coke's description of forgery, 3 Inst. 169, viz. " When the act is done in the name of another person," is apparently too narrow, and taketh in only that species of forgery which is most commonly practised; but there are many other species of forgery which will not come within the letter of that description. Foster 126. So also where a person in possession of a promissory note, which had been lost, indorses it in a fictitious name in order to get it discounted, he is guilty of forgery. *Rex v. Taft*, Leicester Lent Assizes, 1777. M.S.

(2) At Kent Summer Ass. 1777. James Elliot was indicted, among other counts, " For forging a promissory note for the payment of money, with intention to defraud the Bank, &c." It was intended to counterfeit a bank note, but the insertion of the word " pounds" was omitted to be put after the sum; the £. however, was placed as usual at the corner; there was no water mark, " Bank of England," and the paper was of a thicker quality. The jury thought the sum mentioned meant pounds, and the prisoner was found guilty. It was objected that it was not a note for the payment of money, because the word descriptive of money was omitted. Secondly, That the water mark not being in it, it could not be intended to defraud a corporation. On reference the judges held the conviction good, for that perfect similitude is not necessary, but if made with an aptness to impose, it is sufficient. The water mark is not essential, for the Bank are not obliged to use it, and it is enough if the tenor of the note imports a promise from the corporation to pay. *Trin. Term*, 17 Geo. 3. M.S.

(3) In setting out a forged receipt in an indictment upon this act, the words " as follows" is a sufficient averment that the tenor of it is set out. And it is only necessary to aver a general intent to defraud, without stating the manner in which the fraud was to be accomplished. *Rex v. Powell*. Black. 787. So also in forgery of a will, it is not necessary to charge the prisoner with forging *the last will*, &c. To charge it " a paper writing, purporting to be the last will, &c." is sufficient. 2 Black. 790.

† *Stat.*

† *Stat.* 17. By 4 Geo. 2. c. 18. "Whoever shall forge, &c. &c. any pass, commonly called a Mediterranean pass, for any ship whatsoever, or shall counterfeit the seal of office, or the hand of the lord high admiral, or of any of the commissioners of the said office, to any such pass;—or shall alter any true pass made out by the admiralty, or shall knowingly utter and publish the same as true; the offence may be tried in any county, and the offender shall suffer death without clergy."

† *Stat.* 18. By 7 Geo. 2. c. 22. "whoever shall falsly make, alter, forge, or counterfeit, or cause or procure, &c. or shall act or assist in falsly making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for the payment of money, or any warrant or order for payment of money, or delivery of goods, (4) with intention to defraud any person whatsoever; (and by 18 Geo. 3. c. 18. with intention to defraud any corporation whatsoever)—or shall, with the same intent, knowingly utter or publish the same as true, shall suffer death without clergy." O. B. 1784, p. 277, 3011.

(4) A forged order to a shop-keeper to let the bearer have goods, concluding "and I will see it all paid for," is not a warrant or order within the meaning of this act; for the person supposed to give such warrant or order should have, or claim at least an interest in the money or goods which are the subject matter of the order. *Foster* 120.—So in the case of *George Williams*, at Southampton summer circuit, 1775, for forging an order upon *Mr. Guildmare, of Gosport*, in the name of *William Robinson*, for the delivery of twelve barrels of tar; the judges were all of opinion, that, upon the authority of the case in *Foster*, that it was not within the statute, though most of them said, had it been *res integra*, they would have thought otherwise.—So, "Please to send ten pounds by the bearer, as I am so ill I cannot wait upon you," is not an order within the meaning of the statute. For it is not compulsory; nor such an order, as the party giving it, if genuine, had a right to make. *O. B.* 1783, p. 835.—But where a person having delivered a parcel of silver goods to the *Goldsmiths company* to be assayed, two persons took an opportunity to obtain them by a forged order in the name of the owner, such order is within the statute. *O. B.* 1784, p. 1271. So also where a man purchases goods, and takes a small part of them away with him, and coming afterwards to pay for them, receives money in difference out of a draft, signed in the name of a person unknown, who did not keep cash with the banker to whom it was directed, all the judges were of opinion it is within the statute. *Rex v. Lockett*, 1773. *M.S.*

† *Stat.* 19. By 8 Geo. 2. c. 6. s. 31. "Whoever shall forge or counterfeit any entry of the acknowledgment of any bargainor, in bargain and sale, in the registry of York, whereby the freehold or inheritance of any person shall be molested, shall incur the penalties of 5 Eliz.:"

† *Stat.* 20. By the marriage act 26 Geo. 2. c. 33. s. 16. "Whoever with intent to elude the force of this act, shall insert, or cause to be inserted in the register-book, any false entry of any matter or thing relating to any marriage, or shall false make, alter, forge, or counterfeit any such entry in such register,—or any licence of marriage,—or shall cause or procure the same to be done, &c. or shall utter or publish the same as true,—or shall destroy any register-book of marriages,

“ marriages, with intent to avoid any marriage, or to subject
 “ any person to the penalties of this act.”

By 9 Geo. 3.
 c. 30. f. 5. the
 treasurer, comp-
 troller, surveyor,
 clerk of the acts,
 or any commis-
 sioner of the
 navy may act as
 justice, in causing
 the offenders to
 be apprehended
 and brought to
 justice; and all
 officers shall obey
 their warrants
 accordingly.

O. B. 1784,
 p. 98.

† *Sec. 21.* By 31 Geo. 2. c. 10. f. 24. “ Whoever shall
 “ personate or falsly assume the name or character of any of-
 “ ficer, seaman, or other person, intitled or supposed to be
 “ intitled to any wages, pay, or other allowance of money,
 “ or prize-money, for services done on board any of his ma-
 “ jesty's ships, or the executor, administrator, wife, relation
 “ or creditor of any such officer, seaman, or other person, in
 “ order to receive any of the monies so due to such person,
 “ and payable for such services as aforesaid; or shall forge or
 “ counterfeit any letter of attorney, bill, ticket, certificate,
 “ assignment, last will, (5) or any other power or authority what-
 “ soever, in order to receive any the monies so due to such
 “ person, and payable for such services as aforesaid; or shall
 “ take a false oath to obtain the probate of any will or letters
 “ of administration in order to receive the payment of any the
 “ monies as aforesaid; or shall cause or procure any of the
 “ said offences to be committed, shall suffer death without
 “ clergy.”

(5) But the production of the probate is conclusive evidence in support of the will. *Rex v. Vinant*,
 Mich. 8 Geo. Strange 481, 671, 703. Wils. 75. 11 St. Tr. 213, 219, 233. 1 Vesey
 119; 234.

† And by the 9 Geo. 3. c. 30. f. 6. “ Whoever shall know-
 “ ingly utter or publish as true, any false, forged, or counter-
 “ feited letter of attorney, bill, ticket, certificate, assignment,
 “ last will, or any other power or authority, in order to re-
 “ ceive the monies due to any officer, seaman, or other per-
 “ son, who has really, or was supposed to have served, &c.
 “ with intent to defraud any person whatsoever, shall suffer
 “ death without clergy.”

O. B. 1785,
 p. 689.

† *Sec. 22.* By 31 Geo. 2. c. 22. f. 77. and 4 Geo. 3.
 c. 25. f. 15. “ Whoever shall forge or counterfeit any letter
 “ of attorney, or other authority or instrument to transfer,
 “ sell, assign, or convey any share, or part thereof, of, or in
 “ any the capital stock or funds of any body politick or cor-
 “ porate now established, or which shall be established by any
 “ act of parliament; or to receive any dividend attending any
 “ such share; or to receive any annuity in respect whereof
 “ any proprietor shall have a transferrable share; or shall
 “ forge or counterfeit the name of any proprietor of such share,
 “ annuity, or dividend, or of any the persons intitled to any such
 “ annuity or dividend, in or to any such pretended letter of
 “ attorney, instrument, or authority; or shall demand to have
 “ any such share, or part thereof, transferred, assigned, sold,
 “ or conveyed, or any such annuity, dividend, or part there-
 “ of, to be received by virtue of such forged authority; or
 “ shall personate any true and real proprietor, (5) and thereby en-
 “ deavour

O. B. 1784,
 p. 227.

(5) The pro-
 prietor whose
 stock is trans-
 ferred by such

“deavour to receive the money of such proprietor, as if such offender were the true and lawful owner thereof; or shall procure or aid the commission of any of the said offences, shall suffer death without clergy.”

forged power of attorney, is not an admissible witness to prove the forgery. 2 Strange 728.

† *Seft.* 23. By 32 Geo. 2. c. 14. s. 9. “Whoever shall forge or counterfeit the mark or hand of the receiver of the post fines due to the crown or its grantees, whereby such receiver shall be defrauded, or any other person suffer loss, or shall procure the same to be done, shall suffer death without clergy.”

† *Seft.* 24. By 3 Geo. 3. c. 16. “Whoever shall personate, or falsely assume the name and character of an out-pensioner of Greenwich hospital, in order to receive the out pension due to him, or to procure any other to do the same, shall be guilty of felony without clergy.”

† *Seft.* 25. By 4 Geo. 3. c. 24. s. 8. “Whoever shall counterfeit the hand writing of any person whatsoever, in the superscription of any letter or packet to be sent by the post, in order to avoid the payment of the duty of postage, shall be guilty of felony, and transported for seven years.”

And by *Seft.* 2. if any officer misuse the seal of the office he shall forfeit five pounds.

IN FORGERY it is incumbent on the prosecutor to give the best evidence the case admits of, to prove that the forgery charged upon the prisoner is not the hand writing of the person whose deed or instrument it purports to be, before the prisoner shall be put upon his defence; and consequently this proof will become more or less difficult in proportion as the person, whose name or writing is charged to be forged, is more or less defined and identified, either by the instrument itself, or by the representation of the party uttering it. Therefore, where Spunsonby was indicted for forging the name of Pearce, the payee, on the back of a bill drawn by Davis, the court would not permit Pearce to say, although he had received advice of such a bill being drawn in his favour, that he was the payee, in whose favour Davis had drawn the bill, because Pearce may be the name of many others, who by possibility might have indorsed the bill, and as Davis was not present to define or identify the payee, the prisoner was discharged. O. B. 1784, p. 831. and 1015. So also where the name of John Churchill was forged on the back of a bill, the prosecutor proved the hand writing of the drawer, and produced one Henry Churchill, brother to a Mr. John Churchill, who swore the indorsement was not his brother's hand writing; yet as he could not prove that his brother was the identical person to whom the bill was made payable, the evidence was rejected. O. B. 1784, p. 1015. But where the indictment stated that the instrument forged, “purported to be a bank note,” but, in fact, it was very different, and distinguishable from that security, the court held that the defence could not be supplied, so as to support the indictment, by any representations of the party at the time he uttered it. Douglas 300.

APPENDIX THE FIRST.

OF OFFENCES AGAINST PROPERTY
ADHERENT TO THE FREEHOLD.

Vide the recital
of 43 Eliz. c. 7.

FORASMUCH as the unlawful cutting or taking away of corn growing, robbing of orchards and gardens, digging up or taking away fruit trees, breaking of hedges, pales, or other fences, cutting or spoiling of woods or underwoods, and other offences of a similar nature, have become more frequent and common than heretofore.

(a) Vide 37
Hen. 8. c. 6.
s. 4.

In a conviction upon this statute the number and the nature of the trees must be set forth, 1 Salk. 381. Comy. 131. And a gentleman is within the act if he commits the offences. Ld. Ray. 901. So also the manner of stealing must be stated, that the court may judge whether felonious or not, or whether the money ordered to be paid was an adequate recompence to the party injured. Sayer 204, 205.

† *Sec.* 1. It is enacted by 43 Eliz. c. 7. (a) "That whoever shall cut or unlawfully take away any corn or grain growing, or rob any orchards or gardens, or break or cut any hedge, pales, rails, or fence, or dig up or take up any fruit tree, or trees in any orchard, garden, or elsewhere, to the intent to take and carry the same away, or shall cut or spoil any woods or underwoods, poles or trees standing, not being felony by the laws of this realm, and their procurers, receivers, knowing the same, on conviction by confession, or the oath of one witness, before one magistrate, shall make compensation at the discretion of the magistrate, or be publicly whipped." And by 15 Car. 2. c. 2. The constable may search the houses of suspected wood stealers, and carry offenders before a justice, and if they do not "then and there give a satisfactory account how they came by the wood so found in their possession," they shall be adjudged as convicted of the offences, and liable to the punishments of the 43d of Eliz.

Vide *Rex v. Aston*, in a conviction upon this statute, "Igitur consideratum est per me quod commissus est," and the court held there ought to be a judgment quod *factus* fuerit or quod *commissus* fuerit, &c." for the act gives no pecuniary forfeiture. 2 Burr. 1166.

† *Sec.* 2. And it is farther enacted by 1 Geo. 1. c. 48. "That whoever shall maliciously break down, cut up, pluck up, throw down, bark, or otherwise destroy, deface, or spoil any timber tree, fruit tree, or any other tree, on conviction by any two justices of the place, or by the justices in sessions, on complaint to them made by an inhabitant, or the owner, &c. shall be kept to hard labour for three months, and whipped once a month; or if there be no house of correction, to any other prison for four months, and whipped once in every month by the common hangman, and afterwards find sureties for their good behaviour for two years, and the party grieved may recover damages and costs from the inhabitants of the parish, &c. in the

" same manner and form as is directed by the 13 Edw. 1.
 " st. 1. c. 46. (a) for hedges and dykes overthrown by (a) Vide ch. 50,
 " persons in the night, unless the offender be convicted in sect. 1.
 " six months by the parish."

† Sect. 3. And it is further enacted by 6 Geo. 1. c. 16. Vide 4 Burn's
 " That whoever shall cut, take, destroy, break, throw down, Justice, 399.
 " bark, pluck up, burn, deface, spoil, or carry away any
 " wood springs, trees, poles, wood, tops of trees, underwoods,
 " coppice woods, thorns or quicksets, without the consent of
 " the owner, or person chiefly entrusted with the care and
 " custody thereof, shall, on conviction by two justices, or
 " at sessions, be liable to the same penalties and punishments
 " as are inflicted by 1 Geo. 1. f. 2. c. 48. which conviction
 " shall be final;—and unless the same be had within six
 " months, such lords of manors, owners and proprietors who
 " shall be injured by the offence, shall have such remedy and
 " receive such compensation from the parishes or places join-
 " ing on such wood springs, &c. as is directed by 13 Edw. 1.
 " f. 1. c. 46." Vide 29 Geo. 2.
 " c. 36. f. 8. for
 " stealing or de-
 " stroying trees
 " growing in any
 " waste thereby
 " directed to be
 " inclosed.

† Sect. 4. And by the Black act 9 Geo. 1. c. 22. " Who-
 " ever shall cut down, or otherwise destroy any trees planted
 " in any avenue, or growing in any garden, orchard, or
 " plantation, for ornament, shelter, or profit; or shall forc-
 " bly rescue any person in lawful custody for the same; or
 " shall by gift, or promise of money, or other reward, pro-
 " cure any of his majesty's subjects to join him or them in
 " any such unlawful act, shall suffer death without benefit of
 " clergy."

† Sect. 5. And it is also enacted by 6 Geo. 3. c. 36.
 " That whoever shall, in the night time, lop, top, cut down,
 " break, throw down, bark, burn, or otherwise spoil or de-
 " stroy, or carry away any oak, beech, ash, elm, fir, chestnut,
 " or asp timber tree, or by the 13 Geo. 3. c. 33. any pop-
 " lar, alder, maple, larch, or hornbeam, or other trees stand-
 " ing for timber, or likely to become timber, without the
 " consent of the owner—Or shall in the night time pluck
 " up, dig up, break, spoil or destroy, or carry away, any
 " root, shrub, or plant, of the value of five shillings, and
 " which shall be growing, standing, or being in the garden
 " ground, nursery ground, or other inclosed ground of any
 " person whomsoever, and their aiders, abettors, or procurers,
 " and the buyers and receivers of the same, shall be trans-
 " ported for seven years." O. B. 1784-
 " p. 817.
 " O. B. 1786.
 " No. 116.

† Sect. 6. And it is further enacted by 6 Geo. 3. c. 48.
 " that whoever shall wilfully cut or break down, bark, burn,
 " pluck up, lop, top, crop, or otherwise deface, damage,
 " spoil or destroy, or carry away any timber tree, viz. oak,
 " beech

(a) And by 13
Geo. 3. c. 33.
poplar, alder,
beach, maple,
and hornbeam.

The costs and
charges must be
definitely ascer-
tained and ex-
pressed in the
conviction, or it
will be fatal.
Cowp. 60.

Quere. Ought
not these words
"in like manner,"

to be omitted," for can it be imagined that the legislature intended a justice of peace should, in this summary manner, have power to transport an offender; and it seems implied by subsequent words in the act,—“that for the third offence he should be tried by a jury.”

“beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime,
“sycamore, and birch, (a) or any tree likely to become timber,
“or any part thereof, or the lops or tops thereof, without the
“consent of the owner, or in any of his majesty’s forests or
“chafes, without the consent of the surveyor, his deputy, or
“person intrusted with the care of the same, on conviction
“by one witness before one justice, shall forfeit for the first
“offence, not exceeding twenty pounds, together with the
“costs and charges previous to and attending such conviction
“to be ascertained by the justice convicting, and on non-
“payment shall be committed to the common gaol, for any
“time not exceeding twelve months, nor less than six, or un-
“til the penalty and charges shall be paid.—For the second
“offence, any sum not exceeding thirty pounds, and from
“twelve to eighteen months imprisonment as aforesaid. And
“if any person so convicted shall be guilty of the like offence
“a third time, and shall be thereof convicted *in like manner*
“he shall be transported for seven years.”

1 Hale 724.

† *Stat.* 7. And it is further enacted by the said statute,
par. 3. “That whoever shall pluck up, or cut, spoil, or de-
“stroy, or take, or carry away, any root, shrub, or plant, out
“of the fields, nurseries, gardens, or garden grounds, or
“other cultivated lands, of any person whomsoever, without
“the consent of the owners, on conviction by one witness,
“before one justice, shall for the first offence forfeit not ex-
“ceeding forty shillings, together with the charges previous
“to and attending such conviction, to be ascertained by such
“justice, or be committed to hard labour one month, and
“whipped. For the second offence, not exceeding five pounds,
“&c: and hard labour for three months.—And if any person
“so before convicted shall a third time commit the like offence,
“and be thereof convicted, the court before whom he shall
“be tried, shall have authority to transport him for seven
“years.”

† *Stat.* 8. And by par. 4. “Whoever shall go into any
“woods, underwoods, or wood grounds belonging to the
“king’s subjects, and shall there cut, lop, top, or spoil, split
“down, or damage, or otherwise destroy any kind of wood,
“or underwood, poles, sticks of wood, green stubs, or
“young trees, or carry or convey away the same; or shall
“have in their custody any kind of wood, underwood, poles,
“sticks of wood, green stubs, or young trees, and shall not
“give a satisfactory account how they came by the same, on
“conviction by one witness, before one justice, shall forfeit
“for the first offence, and pay immediately on conviction,
“any

“ any sum not exceeding forty shillings, with costs and charges as aforesaid. For the second offence, not exceeding five pounds, &c. and for the third offence, being duly convicted thereof according to law, shall be deemed and punished as an incorrigible rogue : (a) and whoever shall obstruct the apprehending of offenders shall forfeit ten pounds, or suffer six months hard labour in the house of correction.”

(a) That is, by 17 Geo. 2. c. 5. f. 9. he may be committed by the sessions to

the house of correction, not exceeding two years, nor less than three months, to be kept to hard labour, and whipped as the justices shall order.

† *Stat.* 9. And it is further enacted by 9 Geo. 3. c. 41. f. 8. “ That the clause last above recited, shall extend to all his majesty’s forests and chaces within the realm, and to all and every person or persons who shall, without legal right or authority, by night or by day, cut down, destroy, take, carry, or convey away any hollies, thorns, or quicksets growing or being upon any of the king’s forests or chales, or within the woods or wood-grounds of any of his subjects, or who shall possess any hollies, thorns, or quicksets, and shall not give a satisfactory account of the same, &c. The conviction to be certified to the general quarter sessions, and not be liable to be quashed for want of form, or removed by certiorari.”

Vide 10 Geo. 3. c. 30. which remedies a misrecital of the 6 Geo. 3. c. 36, and 48 in this act.

By 4 Geo. 3. c. 31. keepers may seize implement’s of destruction for his or their own use.

† *Stat.* 10. And it is enacted, by 29 Geo. 2. c. 36. f. 8. amended by 31 Geo. 2. c. 41. “ That if any person shall unlawfully cut, take, destroy, break, throw down, bark, pluck up, burn, deface, spoil, or carry away any tree, growing in any waste, wood, or pasture, in which any person or persons, or bodies politick or corporate, hath, or have a right of common, he shall incur the like penalty as by 6 Geo. 1. c. 16.”

Stat. 11. Also it is enacted by the 13 Geo. 3. c. 32. “ That whoever shall steal and take away, or maliciously pull up or destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots growing or being in any garden, lands, or grounds, open or inclosed, on conviction within thirty days, by confession, or on the oath of one witness, before one justice, shall forfeit, not exceeding ten shillings over and above the value of the goods stolen, to be distributed between, or wholly given to, the owner and the poor; and on default of payment to be committed to the house of correction not exceeding one month, unless sooner paid. The owner, or any inhabitant may be a witness, but if the conviction lie upon the oath of the owner, the whole penalty shall go to the poor. And by 31 Geo. 2. c. 35. f. 5. the same punishment is inflicted upon the stealing of madder roots.”

“ *Stat.*

Stealing ore out of mines, is not larceny common law upon the same principle of adherence to the freehold. 4 Comm. 234.

Stat. 12. Also it is enacted by 25 Geo. 2. c. 10. " That whoever shall unlawfully break, or by force enter into any mine, wad-hole of wad, or black cawke, commonly called black lead, or into any pit, shaft, adit or vein of wad, black cawke, or black lead, with an intent to take and carry away from thence any wad, black cawke, or black lead; or shall unlawfully from thence take and carry away any wad, black cawke, or black lead, although such mine, wad-hole, pit, shaft, adit, or vein be not actually broke, or by force entered into by such offender; or shall aid, abet, assist, hire, or command any person or persons to commit such offences as aforesaid, such offenders shall be guilty of felony, and may be committed to the county gaol or house of correction for any time not exceeding a year, and publickly whipped; or transported for a term not exceeding seven years, as the court or judge shall think proper."

Vide 29 Geo. 2. c. 30.
O. B. 1785. p. 824.
Vide the case of the King v. Jane Carragan, tried before Glynn, recorder.

† *Stat. 13.* Also it is enacted by 4 Geo. 2. c. 32. " That whoever shall steal, rip, cut or break, with intent to steal any lead, iron bar, iron grate, iron palafadoes, or iron rail whatsoever, being fixed to any dwelling house, out house, coach house, stable, or other building used or occupied with such dwelling house, or thereunto belonging, or to any building whatsoever, (1) or fixed in any garden, orchard, court yard, fence, or outlet belonging to any dwelling house or other building; their aiders, abettors, and assisters, or whoever shall knowingly buy or receive the same, shall be guilty of felony, and the court is empowered to transport such felons for the space of seven years."

(1) Hickman was indicted for stealing lead from Hendon Church, which was laid to be the property, First, of the Vicar; Secondly, of the Church Wardens; Thirdly, of the inhabitants and parishioners. The property being fixed to the freehold, (vide ante. ch. 33. f. 21.) it was doubted whether it could be the subject of larceny; and if it could, whether the property resided as laid in any of the counts in the indictment. The judges were of opinion, First, that "a Church" is included within these general words of the act, "or any other building whatsoever." Secondly, that the act having made the offence to consist in "stealing from any dwelling house or other building, &c." the charge in the indictment, that it was *stolen from Hendon Church*, was alone a certain and sufficient description of the offence to support the indictment; that the residence of the property was immaterial; and that the conviction was proper upon the first count. O. B. 1785, p. 782.

† *Stat. 14.* And it is further enacted by 21 Geo. 3. c. 68. " Whoever shall rip, cut, break or remove, with intent to steal any copper, brass, bell-metal, utensil or fixture being fixed to any dwelling house, out house, coach house, stable, or other building used or occupied with such dwelling house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court yard, fence or outlet belonging to any dwelling house, or other building, — or any iron rails or fencing set up, or fixed in any square, court, or other place (such person having no title or claim of title thereto); or whoever shall be aiding, abetting, or assisting therein, or shall knowingly buy or receive the

“ the same, although the principal felon has not been convicted of stealing the same, shall be guilty of felony, and the court have power to transport such offender for seven years, or to order him or them to be detained in prison, and therein kept to hard labour for any time not exceeding three years, nor less than one year; and, within that time, if the court shall think fit, he shall be once, or oftener, but not more than three times, publicly whipped.”

APPENDIX THE SECOND.

OF OFFENCES AGAINST SHIPS IN DISTRESS, AND BY PLUNDERERS OF THE WRECK.

† **I**T is enacted by 12 Ann. s. 2. c. 18. “ That all magistrates and officers of every county, corporation, and port town, near the sea, on information of any ship being in distress, shall summon and call together as many civil officers, custom-house officers, and other men, as shall be thought necessary for the assistance and preservation of the said ship, and shall demand of the superior officers of any ship or vessel which shall happen to be riding at anchor near the place, their assistance by their boats, and such hands as they can spare, and on refusal or neglect thereof, such superior officer shall forfeit one hundred pounds. — And it is further enacted, that if any other person than such as shall be empowered by the magistrates as aforesaid, shall enter or endeavour to enter on board any such vessel so in distress, without permission of some one so employed for the preservation of the said ship, such offender may be repelled by force; and if any person shall obstruct the preservation, or deface the mark of any goods saved from the said ship, he shall within twenty days make double satisfaction to the party grieved, at the discretion of the two next justices, or in default be committed to hard labour for twelve months. — And if any goods that were stolen or carried off from any such ship or vessel in distress, shall be found upon any person shall not on demand deliver up the same to the owner, or to his order, he shall forfeit treble the value.”

Made perpetual by 4 Geo. 1. c. 12, but restrained from abridging the jurisdiction of the Cinque ports.

† *Sec. 2.* And it is likewise enacted by par. 5. “ That if any person or persons shall make, or be assisting in the making of any hole in the bottom, side, or any other part of any ship or vessel so in distress as aforesaid, or shall steal any pump belonging to any ship or vessel so in distress as aforesaid, or shall be aiding or abetting in the stealing such pump,

“ pump, or shall wilfully do any thing tending to the immediate loss or destruction of such ship or vessel, such offenders shall suffer death without clergy.”

(a) Vide *Edw.*
1. c. 4.
1 Comm. 290.

† *Seet.* 3. It is also enacted by 26 Geo. 2. c. 19. “ That if any person or persons shall plunder, steal, take away, or destroy any goods or merchandize, or other effects from or belonging to any ship or vessel which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore in any part of his majesty’s dominions, (whether any living creature (a) be on board any such vessel or not) or any of the furniture, tackle, apparel, provision, or part of such ship or vessel; or shall beat or wound with intent to kill or destroy, or shall otherwise wilfully obstruct the escape of any person endeavouring to save his or her life from such ship or vessel, or the wreck thereof; or if any person or persons shall put out any false light or lights, with intention to bring any ship or vessel into danger, such offender shall suffer death without clergy.—Provided, that when goods or effects of small value shall be stranded, lost, or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence, the offender may be indicted and punished as for petit larceny. The prosecutions to be carried on at the expence of the county, by the clerk of the peace, on pain of forfeiting 100l. for refusing or neglecting the same.”

† *Seet.* 4. And it is further enacted by the said statute, par. 11, “ That if any sheriff, justice, mayor, magistrate, coroner, and lord of a manor, commissioners of the land-tax, constable, &c. or other person lawfully authorised, shall be assaulted, beaten, and wounded for, or on account of the exercise of his or their duty, in or concerning the salvage or preservation of any ship or vessel in distress; or of any ship or vessel, goods or effects, stranded, wrecked, or cast on shore, or lying under water in any of his majesty’s dominions, the offender on conviction at the goal delivery, or at the general or quarter sessions, shall be transported for seven years.”

† *Seet.* 5. And it is further enacted, par. 8, “ That if the fact be committed in Wales, then the prosecution shall and may be carried on in the next adjoining English county.”

At Salop summer assizes, 1774, Parry and Roberts were convicted upon this statute, for an offence committed in Anglesea. It was moved, in arrest of judgment, upon the last mentioned clause, that the trial was erroneous, because Cheshire, and not Salop, was the next adjoining English county to Anglesea. To give the prisoners the benefit of the objection, the fact was taken to be so; and the sentence was respited. But all the judges were of opinion that the conviction was proper; for Cheshire, properly speaking, is not an English county; and the words of the statute, being merely a description of the law as it existed at the time, must be construed according to the 26 Hen. 8. c. 6. which gives jurisdiction to the justices of gaol delivery, “ in the counties of England next adjoining

joining to the lordship or place in Wales where the offence is committed? It is true that 26 Geo. 2. c. 19. f. 8. does not go on to say in the words of the 26 Hen. 8. "where the king's writ runneth." But the case of the King v. Athoe, reported in 8th Modern, shows it has been the constant practice ever since to consider Salop as the next adjoining English county. M.S.

APPENDIX THE THIRD.

OF OFFENCES IN TAKING, KILLING, OR DESTROYING FISH.

† **I**T is enacted by 5 Eliz. c. 21. f. 2. "That whoever shall break, cut down, cut out, or destroy any head or dam of any ponds, pools, mores, stagges, fews, or several pits wherein fish are or shall happen to be put in or stored withal by the owners or possors thereof; or do or shall wrongfully fish in any of the said several ponds, pools, mores, fews or pits, to the intent to destroy, kill, take, or steal away any of the same fish, against the will of the owners, shall suffer three months imprisonment, find security for his good behaviour for seven years, and make compensation to the party grieved."

For the offence of trespassing in ponds by encroaching to take fish therein, vide 3 Edw. 1. c. 20. 2 Inst. 200. vide also 31 Hen. 8. c. 2. where this offence was made felony.

† *Sec. 2.* And it is also enacted by 1 and 5 Will. 3. c. 23. f. 5. "That no person, except the owner or occupier of a fishery, shall have or keep any net, angle, leep, picke, or other engine for the taking of fish other than the makers and sellers thereof for their better convenience in the sale of the same, and other than the owner and occupier of any river or fishery for the same being;—and the owner of any river or fishery, or his appointee, may seize, detain, and keep to his own use, all such nets, or other engines which he shall find used in, or in the custody of any person whatsoever, in any river or fishery whatsoever, without the consent of the owner or occupier:—and any person being authorized by a warrant under the hand and seal of a justice of the peace, may search in the day time, the houses, cellars, and outhouses, to keep the same, who shall be suspected of using the same, and the same and every or any of the same, may be seized and kept to his or their own use, or to the use of the justice or justices, or destroyed, as things by this act made forfeit to the persons of their degree.—But the justice or justices, or ermen, &c. authorized to fish in any river or fishery, with lawful nets, &c."

† *Sec. 3.* And it is also enacted by 1 and 5 Will. 3. c. 25. f. 7. "That whoever shall

field declared
that the offence
provided against,
is the stealing of
fish; taking it
without the leave
or consent of the
owner. And the
words *taking and
killing* mean
stealing. It must
therefore appear
that the fish
killed were not
fish of the party's
killing them, and
that they were
not killed in his
own ponds. 2
Burr. 682.

not whatsoever, or any angle, hair noose, trail or spear,
or shall lay any weirs, pots, nets, fish-hooks, or other en-
gines, or shall take any fish by any means or device what-
soever, in any river, stew, pond, mote, or other several wa-
ters or rivers, or shall be aiding or assisting thereunto, with-
out the consent of the owner, on conviction by confession,
or the oath of one witness within a month, before one jus-
tice, shall render compensation, not exceeding treble damages,
and over and above, pay down immediately any sum not ex-
ceeding ten shillings, to the use of the poor, and on default
by distress, shall be imprisoned, not exceeding one month,
in the house of correction, unless the offender shall enter
into a bond to the party injured, with one surety not ex-
ceeding ten pounds, never to offend in like manner.—Jus-
tices may seize the nets, &c. but the party may appeal to
the quarter sessions, which shall be final, unless title to any
land, royalty, or fishery is concerned therein."

† *Stat. 4.* And it is also further enacted by the Black act,
9 Geo. 1. c. 22. "That whoever being armed with swords,
fire arms, or other offensive weapons, and having his or
their faces blacked, or being otherwise disguised, shall un-
lawfully steal or take away any fish out of any river or pond,
or shall forcibly rescue any person in lawful custody for the same,
or shall by gift or promise of money or other reward, pro-
cure any of the king's subjects to join him or them in any
such unlawful act, shall suffer death without clergy."

† *Stat. 5.* Also it is farther enacted by 5 Geo. 3. c. 14.
"That whoever shall enter into any park or paddock fenced
in and inclosed, or into any garden, orchard, or yard, ad-
joining or belonging to any dwelling house, in or through
which park or paddock, garden, orchard, or yard, any
river, or stream of water shall run or be, or wherein shall
be any river, stream, pond, pool, moat, stew, or other
water, and by any ways, means, or device whatsoever,
shall steal, take, kill, or destroy any fish bred, kept, or pre-
served therein, without the consent of the owner thereof;
or shall be aiding or assisting in committing the said offence;
or shall receive or buy any such fish knowingly, upon con-
viction by indictment within six months, before the justices
of gaol delivery where such place shall be, shall be trans-
ported for seven years. And any offender making a dis-
covery of, and convicting his accomplices, is intitled to a
pardon."

† *Stat. 6.* And it is further enacted by the said statute,
par. 3, "That whoever shall take, kill, or destroy, or at-
tempt to take, kill or destroy, any fish in any river or
stream, pond, pool, or other water (not being in any park
or paddock, or in any garden, orchard, or yard, adjoining
" or

“ or belonging to any dwelling house, but shall be in any
 “ other inclosed ground which shall be private property) on
 “ conviction by one witness; shall forfeit five pounds to the
 “ owner for every offence, or be committed to the house of
 “ correction not exceeding six months. Any one justice of
 “ the place, upon complaint on oath, may issue his warrant
 “ to bring the offender before him, and the owner may, at
 “ any time within six months, recover the penalty by action
 “ at law, &c. But by par. 5. nothing in this act shall extend
 “ to any person who shall have a just right or claim to take,
 “ kill, or carry away any such fish as aforesaid.

In a conviction on the above clause, the court declared that it ought to appear that the justice has jurisdiction; that the complaint was made by the owner; and that the fact was committed without his consent. That it must also sufficiently appear, upon oath, that the river, &c. was private property, and who was the owner of it; that the proviso in the fifth section means to except such persons as have especial right to fish in the fishery of another, and that if the owner is the complainer, it would be evidence of his dissent. 4 Burr. 2282.

APPENDIX THE FOURTH.

OF OFFENCES BY INCENDIARIES.

THE CRIME of maliciously burning the house which another is in the possession of, hath been already considered under the title ARSON (a); I shall therefore, in (a) Ante, page this chapter, recite what other offences, by MALICIOUS INCENDIARIES, are created felonies by statute.

† Sect. 1. And first, to repress the daring outrages that formerly prevailed upon the Northern borders of the kingdom, it is, amongst other offences enacted by 43 Eliz. c. 13. s. 2. “ That whoever shall willfully and of malice, burn or cause to
 “ be burned, or aid, procure, or consent to the burning of
 “ any barn or stack of corn, or grain within *Cumberland,*
 “ *Northumberland, Westmorland, or Durham,* shall, on con-
 “ viction at the assizes, or general session of the peace, suffer
 “ the pains of death without benefit of clergy.”

† Sect. 2. But these wicked courses growing into frequent, and secret practice in several parts of the kingdom, it is enacted by 22 & 23 Car. 2. c. 7. “ That if any person or persons shall
 “ in the night time, maliciously, unlawfully and willingly burn,
 “ or cause to be burnt or destroyed, any ricks or stacks of
 “ corn, hay, or grain; barns, or other houses or buildings,
 “ or kilns, the offenders shall suffer as in *cases of felony.*”

† *Sec. 3.* But this statute having made the crimes therein mentioned, only single felonies, and some doubt (a) remaining whether the crime of Arson was not intitled to the benefit of clergy, it was thought expedient to *extend* (b) the provisions of the 22 & 23 Car. 2. c. 7. and it is accordingly enacted. By 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 42.

(a) Poulter's case, 11 Coke 29, and *dictum* per Gould, J. in the case of Rex v. Breeme, 4 Comm. 223.

(b) Vide 2 Black. 722.

(1) A prison, the entrance to which is through a dwelling house, is fully within this act, Rex v. Donnevan. Black. 682.

2 Str. 1247.

“ That if any person or persons shall set fire to any (1) house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or shall forcibly rescue any person being in lawful custody for the same; or shall by gift, promise of money, or other reward procure another to join him or them in any such unlawful act, every person so offending shall suffer death without clergy.”—The person injured by this offence may sue the hundred (2) to the amount of two hundred pounds, and a reward of fifty pounds is offered for apprehending, &c. the offender.

(2) The words wilfully and maliciously, are not inserted in the above clause of the Black act; and it hath therefore been adjudged, that they need not be laid in a declaration against the hundred; for a declaration may follow the statute, however imperfectly expressed. But the court thought it probable that an indictment, for the felony itself, must charge the offence to have been done wilfully and maliciously, for otherwise it is no crime. Black. 843.

† *Sec. 4.* And to encourage and protect plantations of woods, It is enacted by 1 Geo. 1. st. 2. c. 48. f. 4.

Burning woods. “ That whosoever shall maliciously set on fire, or burn, or cause to be burned, any wood, underwood, or coppice, or any part thereof, shall suffer and be liable to all the penalties and forfeitures as felons by the law now are.”

† *Sec. 5.* It is also enacted by 10 Geo. 2. c. 32. f. 6.

Firing coal-mines. “ That whoever during the continuance of the before-mentioned act of 9 Geo. 1. shall wilfully and maliciously set on fire, or cause to be set on fire, any mine, pit, or delph of coal, or cannel coal, shall suffer death without clergy.”

† *Sec. 6.* It is enacted by 9 Geo. 3. c. 29. f. 2. “ That whoever shall wilfully or maliciously burn, or set fire to any wind-saw-mill, or other wind-mill, or any water-mill, or other mill, shall suffer death without benefit of clergy.— Provided the prosecution be commenced within eighteen months after the offence committed.”

Burning mills.

For the offence of throwing squibbs and fire-works, vide 10 & 11 Will. 3. c. 7. For burning garments with aqua fortis, &c. vide 6 Geo. 1. c. 23. App. 9. For burning private ships by officers and mariners vide ch. 43. sect. 10. For burning the public property, as ships of war, magazines, stores, &c. vide ch. 12. f. 13, 14. For burning houses by the negligence of servants, vide ante, c. 53. For the offence of threatening to burn houses, barns, &c. vide 27 Geo. 2. c. 15. For burning and destroying engines to draw water out of mines, 9 Geo. 3. c. 29. f. 3. For burning wains, or carts loaded, vide 37 Hen. 8. c. 6. f. 4. For burning the covert for the red and black game, 4 & 5 Will. and Mary, c. 23. f. 11. For burning the covert for preserving deer, vide 23 Geo. 2. c. 19. f. 3.

APPENDIX THE FIFTH.

OF SHOOTING AT ANOTHER,
AND
OF SENDING THREATENING LETTERS.

† It is enacted by the Black act, 9 Geo. 1. c. 22. "That if Vide Appendix, case, 8 St. Tr. 290, for shooting at Lord Onslow.
 " any person or persons shall, wilfully and maliciously (1)
 " shoot at (2) any person in any dwelling house, or other
 " place; or shall forcibly rescue any person in lawful custody
 " for the said offence; or shall by gift, or promise of money,
 " or other reward, procure any other to join with him or
 " them in such unlawful act, such offenders shall be adjudged
 " guilty of felony, (3) and suffer death without the benefit of
 " clergy."

(1) It has also been *laid down*, by authority, that the word "maliciously" constitutes the essential part of the offence, and that no act of shooting will amount to felony by this statute, unless it be with intent; such homicide would have been murder. It follows, therefore, that neither an accidental shooting, which is neither wilful or malicious; nor a shooting in the intermixture of passion, upon such a provocation, as would, in law, reduce the crime of homicide to manslaughter, in which no malice can exist; are within the meaning of this statute. O. B. 1786, p. 7, 8.

(2) There must be a shooting at the person to constitute this felony, O. B. 1781, No. 261. And the shooting must be with a gun, or other instrument, loaded with a leaden bullet, &c.

(3) It has also been *determined*, that this statute creates a new felony, which consequently possesses all the qualities incidental to a felony at common law. Therefore, if several persons associate in the pursuit of the same unlawful design, and only one of them shoot, they are all equally involved in his guilt; for the act of one being considered as the act of all, whoever is present aiding and assisting, are adjudged principals in the second degree. The Coal-heaver's case.—At the Lent Assizes for Surrey, 1784, Gibson, Mutton, and Wiggs were tried upon two indictments, before Mr. Baron Perryn. The one for burglary, the other upon this statute, and they were found guilty. Garrow moved in arrest of judgment, and the sentence was respited. But the prisoners having been convicted of the burglary, the judges never gave any opinion. In a case subsequent to this, however, where one only, among a number, had fired, and the evidence left it in doubt which it was; Mr. Justice Ashurst directed the jury to consider, First, Whether the act of shooting at another had been committed; Secondly, Whether the prisoners were present aiding and assisting; and on a reference, the judges were of opinion, upon the authority of the Coal-heaver's case, which they recognized as good law, that the direction was proper, and the conviction right. M.S.

† Sect. 2. "It is also enacted by the said statute, par. 14.
 " That every offence that shall be done or committed con-
 " trary to this act, shall and may be enquired of, examined,
 " tried and determined in any (4) county within England, in
 " such manner and form as if the fact had been therein commit-
 " ted. But no attainder upon this act shall work corruption
 " of blood, (5) loss of dower, or forfeiture.
(4) It was determined by the judges, in the case of the King v. Rich Martin, 11 Geo. 3. before Mr. Baron Eyre, that this clause gives to a private prosecution.

or the opinion of proceeding in any county; and that there is no necessity for a special commission. M.S.—(5) An estate came to a convict on this act, and, as it saves corruption of blood, &c., a creditor was permitted to serve him with a writ, in order to obtain a judgment for his debts. Lord R. m. 357a.

Threatening
letter.

For the form of
an indictment
for this offence,
vide Cro. Cir.
Com. 153.

† *Secl.* 3. It is also enacted by the said statute 9 Geo. 1. c. 22. "That if any person or persons shall knowingly send any letter, without any name subscribed thereto; or signed with a fictitious name, demanding money, venison, or other valuable thing; or shall forcibly rescue any person being lawfully in custody of any officer or other person for the offences aforesaid; or shall by gift, or promise of money or other reward, procure another to join him or them in any such unlawful act, such offender shall suffer death without benefit of clergy."

1 Burn. 293.
O. B. 1785,
p. 219.
1 Hale, 567.

† *Secl.* 4. And it is enacted by 27 Geo. 2. c. 15. "That if any person or persons shall knowingly (6) send any letter without any name subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to kill or murder any of his majesty's subjects, or to burn their houses, outhouses, barns, stacks of corn or grain, hay or straw, though no money or venison, or other valuable thing shall be demanded, in or by such letter or letters, or shall forcibly rescue any person in lawful custody for the same, such offender shall suffer death without benefit of clergy."

(6) It has been determined, that proof of the prisoners merely delivering a letter of this kind, to another, without any intima-

tion of what was contained in it, for the purpose of its being conveyed to the prosecutor, is sufficient evidence of his sending it, *knowing the contents*.—And that the offence may be tried by a jury of the county in which the letter was delivered to the prosecutor, although the original delivery, for the purpose of conveying it to him, was in a different county. But it seems, that the threat contained in it, should be conceived in express and unequivocal terms, and not drawn from it by inference or implication. *Rex v. Girdwood*, O. B. February sessions, 1776, upon the unanimous opinion of all the judges. M.S. For the threat is the gist of the offence. O. B. Dec. 1784.

No certiorari
will lie upon
this act to re-
move an indict-
ment from the
justices of Mid-
dlesex. Cow-
per 24.

For the offence
of sending a
threatening letter
to a master wool-
comber, &c. &c.
vide *Intra*. ap-
pendix 10. f. 8.

† *Secl.* 5. And it is further enacted by 30 Geo. 2. c. 24. "That all persons who shall knowingly send or deliver any letter or writing, with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by the law with death, transportation, or pillory, or any other infamous punishment, with a view or intent to extort or gain money, goods, wares, or merchandizes, from the person or persons so threatened to be accused, shall on conviction be put in the pillory, publicly whipped, or fined and imprisoned, or transported, not exceeding the space of seven years, in the discretion of the court."

APPENDIX THE SIXTH.

OF OFFENCES BY SMUGGLERS.

† **SMUGGLING** consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandize, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited. This offence is productive of various mischiefs to society. The public revenue is thereby lessened; the fair trader is injured; and the nation impoverished; rival and perhaps hostile states are thereby enriched; and the persons guilty thereof, being hardened by a course of disobedience to and defiance of law, behave so abandoned and daring as not to hesitate at being guilty of the greatest offences. It is therefore restrained by a great variety of statutes (*a*) which inflict pecuniary penalties, and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon mere open daring and avowed practices. But the following statute is, for this purpose, *instar omnium*.

† *Stat. 1.* And it is accordingly enacted, by 19 Geo. 2. c. 34. "That if any persons, to the number of three or more, armed with fire-arms or other offensive weapons, (1) shall be assembled (2) in order to be aiding and assisting in the illegal exportation of wool or other goods prohibited to be exported, or the carrying of wool or other such goods in order to such exportation, or in the running, landing, or carrying away prohibited or uncustomed goods or goods liable to pay any duties which have not been paid or

4 Comm. 155.
4 Bac. Abr. 513,
543.
1 Comm. 317.
Beccar. c. 33.
8 Mod. 5.

(a) 5 Geo. 1.
c. 11.
6 Geo. 1. c. 21.
9 Geo. 2. c. 35.
13 & 14 Car. 2.
c. 11.
8 Geo. 1. c. 18.

A prisoner committed upon this act, for assisting in running goods is not within the 18 Geo. 2. c. 28.

O. B. 1784,
No. 759.

(1) The weapons must be such as are calculated for the purposes of offence; therefore, where one man had only a common horse-whip, although all the rest of the gang had fire-arms, the Attorney General declined to argue the point, and the prisoner was discharged. Str. 1166. So also a hatchet has been thought no offensive weapon within this act, where it was only caught up upon the spur of the occasion, and belonged to the prisoner in the way of his business. O. B. 1786, p. 837. So also a large stick, with three natural prongs and a large head, has been held no offensive weapon. O. B. 1785, p. 424. But it is impossible for the law to draw a precise line which will hold in all cases as to what shall, or shall not, be called an offensive weapon. It must greatly depend on the circumstances of the case; for it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war should be considered as offensive weapons; bludgeons, clubs, and any thing not in common use; pokers, shovels, tongs, &c. and even a common walking stick, may be offensive weapons, according to the circumstance, which accompany the use of them. It is therefore a question of fact for the jury, Whether the instrument was carried for the purposes of offence or not? O. B. 1785. p. 780.

(2) It has been laid down, that there must be a clear, premeditated assembling for the express purpose of landing the goods, or doing the several acts mentioned in the statute; for it is not the intention of the act to include persons, who upon a sudden alarm, join in an attempt to smuggle. O. B. 1784, p. 1071. O. B. 1786, p. 100. O. B. 1780, p. 970.

O. B. 1785.
No. 320.

“ secured; or in the illegal relanding of any goods whatsoever which have been shipped or exported upon debenture or certificate; or in rescuing or taking away the same after seizure, from any officer or officers of the customs or excise, or other his majesty’s revenue, or other person, or persons employed by him or them, or assisting him or them, or from the place where they shall be lodged by him or them; or in rescuing any person who shall be apprehended for any of the offences made felony by this or any other act relating to the revenues of customs or excise; or in preventing the apprehending of any person who shall be guilty of any such offence; or in case any persons to the number of three or more, so armed as aforesaid, shall be so aiding or assisting; or if any person shall have his face blacked, or wear any vizard, mark, or other disguise, when passing with such goods, (3) or shall forcibly hinder, obstruct, assault, oppose or resist any of the officers of the customs or excise, or other his majesty’s revenue, in the seizing or securing such goods; or if any person or persons shall maim or dangerously wound any officer of the customs or excise, or any other his majesty’s revenue, in his attempting to go on board any ship or vessel within the limits of any of the ports of this kingdom; or shoot at, maim, or dangerously wound him when on board such ship or vessel, and in the due execution of his office or duty, (4) then every person so offending shall be adjudged guilty of felony, and suffer death without benefit of clergy.”

Vide *Infra*, 19 Geo. 3. c. 69. s. 10. by which the offence of obstructing officers is made misdemeanour only.

O. B. 1784,
p. 848, 857.

(3) It has been said, that this clause has no regard to the number of persons, nor to their being armed; and that an individual, with his face blacked, passing with such goods, would, in all probability, be deemed within the act. And that the word, *or* being coupled with the preceding sentence, seems also to be a clause which would reach any individual who shall obstruct. O. B. 1784, p. 1071.

(4) On an indictment on this statute the prosecutor must give evidence that the officers acted as revenue officers, and that the goods were uncustomed; but circumstantial proof is sufficient. O. B. 1784, p. 1002; O. B. 1786, p. 100.

The 26 Geo. 2. c. 32. 32 Geo. 2. c. 18. 4 Geo. 3. c. 12. which continue this present act of the 19 Geo. 2. c. 34. having created some doubt whether this surrender clause was not repealed, it is declared by 19 Geo. 3. c. 65, to be in full force:

† *Stat. 24.* And it is further enacted by the said statute, par. 2. “ That if any person or persons shall be charged with being guilty of any of the offences aforesaid, before any one or more of his majesty’s justices of the peace, or before one of his majesty’s justices of the King’s Bench, if the offence be committed in England; or before the lord justice general, or one of the lords of judiciary, or any one or more of his majesty’s justices of the peace in Scotland, if the offence be committed in Scotland; by information of one or more credible person or persons, upon oath by him or them to be subscribed, such justice of the peace, or justice of the King’s Bench, or lord justice general, lord justice clerk, or lord of judiciary respectively, before whom such information shall be made as aforesaid, shall forthwith certify under his hand and seal, and return such information to one of the principal secretaries of state, who

" is hereby required to lay the same as soon as conveni-
 " ently may be before his majesty in his privy council; where-
 " upon it shall and may be lawful for his majesty, his heirs
 " or successors, to make his or their order, in his or their
 " said privy council, thereby requiring and commanding such
 " offender or offenders to surrender him or themselves within
 " the space of forty days, after the first publication thereof
 " in the London Gazette, to the lord chief justice, or to any
 " other of his majesty's justices of the court of King's Bench,
 " or to any one of his majesty's justices of the peace, if the
 " offence be committed in England; or to any of the lords
 " justiciary, or to any one of his majesty's justices of the
 " peace in Scotland, if the offence be committed in Scot-
 " land; who is hereby required upon such offender or offend-
 " ers surrendering him or themselves, to commit him or them,
 " without bail or main prize, to the county gaol, or to the
 " gaol or prison of the place where he or they shall so surren-
 " der, to the end that he or they may be forthcoming to an-
 " swer the offence or offences wherewith he or they shall stand
 " charged, according to due course of law, which order the
 " clerks of his majesty's privy council shall cause to be forth-
 " with printed and published in the two successive London
 " Gazettes, and to be forthwith transmitted to the sheriff
 " of the county where the offence shall be committed, who
 " shall within fourteen days after the receipt thereof, cause
 " the same to be proclaimed, between the hours of ten in
 " the morning, and two in the afternoon in the market-places
 " upon the respective market-days, of two market-towns (a) in
 " the same county, near (b) to the place where such offence shall
 " have been committed, and a true copy of such order shall
 " be affixed upon some public place in such market-towns.
 " And in case such offender or offenders, shall not surrender
 " him, or themselves, pursuant to such order of his majesty,
 " his heirs or successors, to be made in council as afore-
 " said, he, or they so neglecting or refusing to surrender him,
 " or themselves as aforesaid, or escaping after such surrender,
 " shall from the day appointed for his or their surrender
 " as aforesaid, be adjudged, deemed, and taken to be
 " convicted and attainted of felony, and suffer death without
 " clergy, if the offence be charged to have been committed
 " in England; and of a capital crime, and suffer death and
 " confiscation of moveables, as in case of a person found
 " guilty of a capital crime, and under sentence for the same, if
 " the offence be charged to have been committed in Scotland.
 " And that it shall be lawful to and for the court of King's Bench,
 " or the justices of oyer and terminer or general gaol deli-
 " very, for the county or place where such person shall be, to
 " award execution against such offender and offenders, in such
 " manner as if he or they had been convicted and attainted in
 " the said court of King's Bench, or before such justices of

Vide the case of
 George Cossan,
 who was arraign-
 ed upon a sug-
 gestion upon this
 clause, for not
 surrendering.
 O. B. 1781, No.
 422. But, at a
 subsequent ses-
 sion, the attor-
 ney general chuf-
 ing to try him
 on the indict-
 ment only, the
 court ordered a
noli prosequi
 to be entered on the
 suggestion. O. B.
 1785, No. 660.

(a) The market
 towns should be
 set forth in the
 suggestion by
 name; for other-
 wise the prisoner
 can not give a
 particular answer
 to that part of
 the suggestion,
 nor come proper-
 ly prepared with
 his proofs when
 the issues shall be
 tried. Foster 36.
 For every law in-
 troducing a capi-
 tal punishment,
 ought to be
 strictly pursued.
 1 Wilson 165.

(b) Vide Infra
 sect. 9.

“oyer and terminer or general gaol delivery respectively, if
 “the offence be charged to have been committed in Eng-
 “land, and that it shall be lawful for the court of Justiciary,
 “or the lords Justiciary in their circuits, to award execution
 “against such offender or offenders in such manner as if he
 “or they, had been found guilty and condemned in the
 “said court of Justiciary, or in the circuit respectively.”

† *Sec. 3.* And it is further enacted by the said statute, par.
 3. “That whoever shall after the time appointed as afore-
 “said, for the surrender of any person or persons so charged
 “upon oath, with any of the offences aforesaid, shall be
 “expired, harbour, receive, conceal, aid, abet, or succour
 “such person or persons, knowing him or them, to have been
 “so charged as aforesaid, and to have been required to sur-
 “render him or themselves, by such order or orders as afore-
 “said, and not to have surrendered pursuant to such order or
 “orders, being prosecuted for the same within one year after
 “the offence committed, and lawfully convicted thereof, shall
 “be guilty of felony, and transported for seven years.”

Vide 19 Geo. 3.
 c. 69.

† *Sec. 4.* And it is further provided, “That nothing, &c.
 “shall hinder any judge, justice of the peace, magistrate or
 “officer, from taking such offender and proceeding against
 “him by the ordinary course of law. The indictment or
 “information may be laid in any county in England, but
 “no attainder shall work corruption of blood.”

Foster 51.
 1 Willson 364.
 4 Bac. Ab. 567.
 O. B. 1785,
 p. 646, p. 772.

† *Sec. 5.* The following constructions have been held upon
 this statute, First, That it is certainly necessary to suggest the
 several facts and requisites in the act on the roll, in order to
 ground a prayer for execution; for they are the several steps
 which the act requireth to be taken by the crown, in order to
 bring the prisoner under an attainder: And he may traverse
 them all, and the offender will not be affected, unless the several
 requisites mentioned in the act have been complied with
 in his particular case; and if he traverseth all or any of them,
 the *onus probandi* lies upon the crown; for this is not like the
 case of an attainder by act of parliament, in which the
 facts are settled, the person named, and the only question is,
 Whether the prisoner is the identical person attainted.

Foster 56.

† *Sec. 6.* Secondly, That if the prisoner would take advan-
 tage of the insufficiency of the suggestion, *viz.* because the
 names of the market-towns at which it is enacted the offen-
 der shall be proclaimed, is not set forth—he must demur. He
 cannot take advantage of it on motion.

Foster 56.

† *Sec. 7.* Thirdly, That if the prisoner pleads, he must do
 it *instante* and *ore tenus*, as is done in indictments; for there
 can be no inconvenience in his pleading *instante* if he intends

to put the proof of all the matters suggested on the roll upon the crown.

† *Secl.* 8. Fourthly, that the prisoner is not intitled to a Poster 56.
copy of the suggestion.

† *Secl.* 9. Fifthly, That the words, “near to the place,”
are restrictive of the sheriff’s power, and that the proclama- Poster 57.
tion must be made in the market towns near the place, and
not at remote towns, nor at towns even comparatively remote,
for though it does not mean at the very next market towns,
it would be very dangerous to leave matters of this sort to the
discretion of the sheriff merely.

† *Secl.* 10. Sixthly, That the proceedings at the trial shall
be in the same form and manner, as before justices of gaol
delivery.

† *Secl.* 11. It is enacted by 19 Geo. 3. c. 69. s. 10. “That
“whoever shall assault, resist, oppose, molest, obstruct, or
“hinder any officer or officers of the customs or excise in due
“seizing or securing any coffee, tea, cocoa nuts, chocolate,
“foreign brandy, or other foreign spirituous liquors, or any
“other goods whatsoever, which by any officer or officers
“of the customs or excise shall or may be liable to be seized
“by virtue of, or in pursuance of any act now in force; or
“shall by force or violence rescue, or shall cause to be rescued,
“any of the said goods, after the same shall have been seized
“by such officer or officers as aforesaid, or shall attempt or
“endeavour so to do, or after seizure shall cut, stave, break,
“or otherwise destroy or damage any casks, vessels, boxes,
“or package, wherein the same shall respectively be con-
“tained; it shall and may be lawful to and for the officers
“of the customs or excise, and for all persons acting in their
“aid or assistance, to stop, arrest, and detain, all and every
“the person and persons so offending, and him her or them
“forthwith to carry before one or more justice of peace near
“to the place where the same shall be done, who may com-
“mit to the next county gaol till the next general quarter
“sessions there to be tried in the manner the act directs.”

Vide 11 Geo. 2.
c. 30. for the
penalty of ob-
structing officers
and for dispen-
sing with the
production of
their deputation
at the trial, &c.

† *Secl.* 12. It is also further enacted by 24 Geo. 3. s. 2.
c. 47. s. 11. “That if any person or persons upon the
“shore, or on board any ship, vessel, or boat, shall mali-
“ciously shoot at, or upon any ship, vessel, or boat belonging
“to his majesty’s navy, or in the service of the customs or ex-
“cise, within the limits of any port, harbour, or creek of
“Great Britain, or within four leagues from any part of the
“coast thereof; or if any person or persons being on shore,
“or on board any ship, vessel, or boat, shall maliciously shoot
“at, or maim, or dangerously wound any officer or offi-
“cers of his majesty’s navy, or of the customs or excise,

N. B. The of-
fender upon this
act is also sub-
ject to the for-
feiture clause of
the foregoing
act.

If an offender against this statute acts under the commands of his superiors without privity, and from a just apprehension that his own life is endangered by disobedience, it is a defence upon which he may be acquitted. O. B. 1786, No. 660.

“whether attempting to go on board, or being on board; or
 “returning from on board any ship, vessel or boat, or other-
 “wise acting in the due execution of his or their duty on
 “shore, or within the limits of any port, harbour, or creek
 “of Great Britain, or within four leagues of any part of the
 “coast thereof,—or shall maliciously shoot at, maim, or dan-
 “gerously wound any person or persons, aiding and assisting
 “such officer or officers in the execution of his or their
 “duty as aforesaid, then every person so offending, and all and
 “every person being aiding, abetting, or assisting therein,
 “shall be guilty of felony, and suffer death without clergy.”

APPENDIX THE SEVENTH.

OF OFFENCES IN BUYING AND RECEIVING STOLEN GOODS.

For the mode of proceeding against accessories vide 1 Ann. st. 2. c. 9. 5 Ann. c. 31. 4 Geo. 1. c. 11, and 2 Hawk. c. 29, *passim*. Vide Foster 73. and 273.
 O. B. 1758, No. 11, 12.
 O. B. 1758, No. 30, 31.
 O. B. Dec. 1-83, Rex v. Smith.

† FORASMUCH as thieves and robbers are much encouraged to commit offences, because a great number of persons make it their trade and business to deal in the buying of stolen goods, it is enacted by 3 Will. & Mar. c. 9. s. 4. and 5 Ann. c. 31. s. 5. “That whoever shall buy or receive any goods or chattels, (1) that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, shall be taken and deemed an accessory to such felony after the fact, and shall incur the same punishment as an accessory to the felony after the felony committed.” And by 4 Geo. 1. c. 11. Persons convicted of buying or receiving stolen goods, shall be transported for the term of fourteen years.

(1) A man was indicted for receiving goods and money; he was proved to have received the money, but the goods could not be traced into his hands; therefore, Willes, C. J. directed his acquittal. For the act is confined to the knowingly receiving of *goods* only, and it has been frequently explained, that money could not mean the goods and chattels of a person robbed. O. B. 1779. Vide *Infra*. But the dealing of Bank notes is made felony by 2 Geo. 2. c. 25, and the offender liable to such punishment as if he had stolen *other goods*. Therefore, the knowing and felonious receivers of this species of property are liable to punishment like other offenders. Rex v. E. Woods. *Select Trials*, 3 vol. p. 195. And in the case of the King and Tipping, 11 Geo. 3. it was determined by all the judges, that sheep and rams are comprehended within the words “goods and chattels,” mentioned in this act. M.S. But the bare receiving of stolen goods, knowing them to be stolen, makes not an accessory; for he may receive them to keep for the true owner, or till they are recovered or restored by law. 1 Hale 620.

† *Stat.* 2. And it is also enacted by 20 Geo. 2. 30. “That every person who shall buy or receive any lead, iron, copper, brass, bell-metal, or solder, knowing the same to be unlawfully come by; or shall privately buy or receive any stolen lead, iron, copper, brass, bell-metal, or solder, by suffering any door, window, or shutter to be left open or unfastened,

"fastened, between sun-setting or sun-rising for that purpose; or shall buy or receive the same, or any of them, at any time, in any clandestine manner from any person or persons whatsoever, although the principal felon or felons, has not; or have not been convicted of stealing the same, shall, on conviction by due course of law, be transported for fourteen years."

† *Stat.* 3. And it is enacted by the said statute, par. 2.

"That any one justice upon complaint on oath, by any credible persons, that there is cause to suspect (a) stolen lead, iron, copper, brass, bell-metal, or solder, to be concealed in any dwelling-house, out house, yard, garden, or other place, by warrant under his hand and seal, may cause the same to be searched, in the day time, and if any of the articles so suspected to be stolen shall be found therein, the same together with the person in whose custody it is found, shall be brought before any two justices of the county or place, and if the said person shall not give an account of the same to the satisfaction of the justices, or shall not within some convenient time, to be set by the said justices, produce the party of, or from whom he bought or received such stolen lead, &c. &c. he shall be adjudged guilty of a misdemeanor—*forfeit for the first offence 40s. For the second 4l. and for every subsequent offence 6l.*"

Justices on suspicion may hear and determine.

(a) A bare surmise is not sufficient.

4 Inst. 177.
2 Hale 113, 150.

† *Stat.* 4. And it is further enacted by par. 3. "That every constable, headborough, or tithingman, in every place where they shall be officers, and every beadle in his district, and every watchman, during such time only as he is on his duty, shall apprehend every person who may reasonably be suspected of having, or carrying, after sun-setting and before sun-rising, any lead, iron, copper, brass, bell-metal, or solder suspected to be stolen, and carry them before any two justices for the county or place, and if such person do not produce the party from whom he bought or received the same, or some other credible witness to depose upon oath, the sale or delivery of the said lead, &c. or shall not give a satisfactory account how he came by the same, he shall be adjudged guilty of a misdemeanor, and forfeit as aforesaid."

Officers empowered to apprehend suspected persons.

† *Stat.* 5. And it is further enacted, "That on conviction, any two justices may order such lead, copper, brass, bell-metal, or solder, to be deposited with the church-wardens or overseers of the place where it shall be found, or in any other convenient place, for any time not exceeding thirty days, and to order the church-wardens and overseers in every parish within the bills of mortality, to advertise the same, and in every other parish to give notice by the public crier, and by fixing a description of the same, and where deposited,

How the goods are to be disposed of.

“ deposited, on the church door, that the same may be claimed
 “ by the owner, or some reputable person in his behalf. And
 “ in case any person can prove their property in the same,
 “ upon oath, to the satisfaction of any two justices for the
 “ county or place, they shall order restitution after pay-
 “ ment of the expences, if not, the same shall be sold at
 “ the end of the said thirty days, and after deducting the
 “ charges, one moiety shall be given to the person who shall
 “ apprehend the offender, and the other to the poor of the
 “ parish where the offence is committed, if it is known where,
 “ or otherwise where such conviction shall be made.”

Private persons
must apprehend
suspected offen-
ders.

† *Sec. 6.* And it is further enacted by par. 5. “ That every
 “ person to whom any lead, iron, copper, brass, bell-metal, or
 “ solder, shall be brought and offered to be sold, pawned, or
 “ delivered, shall (there being reasonable cause to suspect
 “ the same were unlawfully come by) apprehend, secure and
 “ carry before a justice of the county or place, where the same
 “ shall be so brought or offered, the person or persons so
 “ bringing or offering the same, together with such lead,
 “ iron, copper, brass, bell-metal, or solder, and such per-
 “ sons so apprehended shall be dealt with, and such articles
 “ shall be deposited and disposed of, in the same manner as if
 “ the offender had been apprehended by the officers before-
 “ mentioned. And if it shall appear upon the oath of any
 “ person, notwithstanding he were concerned in stealing the
 “ same, if corroborated with other credible circumstances, to
 “ the satisfaction of two justices for the county or place where
 “ the same shall be so brought and offered, that there was rea-
 “ sonable cause to suspect such lead, &c. was unlawfully come
 “ by, and that the person to whom the same was so brought
 “ and offered, did not (having it in his, her, or their power
 “ so to do) apprehend, secure, and carry before a justice
 “ as aforesaid, the person or persons who so brought and of-
 “ fered the same, that then the person to whom the same was
 “ offered, shall be deemed guilty of a misdemeanor.”

How the penal-
ties shall be
levied and ap-
plied.

† *Sec. 7.* And it is further enacted, “ That all the said for-
 “ feitures shall be levied by distress, by warrant under the
 “ hands and seals of any two justices, before whom such offen-
 “ der was deemed and adjudged guilty; one moiety to the in-
 “ former, the other to the poor. And on default, the said
 “ justices shall commit the offender to the common gaol, or
 “ other prison, or house of correction within their jurisdiction,
 “ for one month for the first offence, two months for the
 “ second, and for every subsequent offence, until such offen-
 “ der shall be discharged by order of the court of general, or
 “ quarter sessions.”

† *Sec. 8.* And it is further enacted by 2 Geo. 3. c. 28.
 “ That whoever shall buy, or receive any part of the cargo
 “ —”

“ or loading of, or any goods, stores, or things of, or
 “ belonging to any ship or vessel in the river Thames, know- Buying stolen goods from vessels in the river.
 “ ing the same to be stolen, or unlawfully come by, or shall
 “ privately buy or receive any such goods, stores, or things,
 “ or any part of such cargo or loading, by suffering any door,
 “ window, or shutter to be left open, or unfastened, between
 “ sun-setting and sun-rising for that purpose, or shall buy or
 “ receive the same, or any of them, at any time, in any clan-
 “ destine manner, from any person or persons whomsoever,
 “ although the principal offender has not been convicted of
 “ stealing, or unlawfully procuring the same, shall be trans-
 “ ported for fourteen years.”

† *Sec. 9.* And it is also enacted by 10 Geo 3 c. 48. “ That Receiving jewels, &c.
 “ every person who shall buy, or receive any stolen jewel, or
 “ jewels, or any stolen gold or silver plate, watch or watches,
 “ knowing the same to have been stolen, shall, in all cases
 “ where the said goods shall have been feloniously stolen, ac-
 “ companied with a burglary actually committed in the steal-
 “ ing the same, or shall have been feloniously taken by a rob-
 “ bery on the highway, shall be triable as well before convic-
 “ tion of the principal felon, in such felony and burglary,
 “ or robbery, whether he shall be in or out of custody, as af-
 “ ter his conviction, and being convicted thereof, he shall be
 “ deemed guilty of felony, and be transported for the space
 “ of fourteen years.”

† *Sec. 10.* And it is further enacted by 21 Geo. 3. c. 69. Pewter, trans- portation seven years.
 “ That every person who shall buy, or receive any pewter pot,
 “ or other vessel, or any pewter in any form or shape what-
 “ ever, knowing the same to be stolen, or unlawfully come
 “ by; or shall privately buy, or receive any stolen pewter,
 “ by suffering any door, window, or shutter to be left open
 “ or unfastened, between sun-setting and sun-rising for that
 “ purpose; or shall buy or receive the same at any time, in any
 “ clandestine manner from any person or persons whatsoever,
 “ although the principal felon, or felons has not, or have not
 “ been convicted of stealing the same, shall be transported for
 “ any time not exceeding seven years, or kept and detained in
 “ prison, and therein kept to hard labour, for any time not ex-
 “ ceeding three years, nor less than one year, and within
 “ that time (if the court shall think fitting) shall be once,
 “ or oftener, but not more than three times, publicly
 “ whipped.”

† *Sec. 11.* And it is further enacted by 22 Geo. 3. c. 58.—
 “ That in all cases whatsoever, where any goods and chattels Offenders may be tried for the misdemeanour. Vide B. 2 c. 49.
 “ (except lead, iron, copper, brass, bell-metal, and folder)
 “ shall have been feloniously taken and stolen, whether the
 “ offence of the person or persons, so taking or stealing the
 “ same, shall amount to grand larceny, or some greater of-
 “ fence,

Vide *Rex v. Wilkes and Forgate*.

(a) Vide the case of *William Haslam*, indicted for a misdemeanour upon this act, where it was determined that the principal felon may even be admitted as an evidence against the receiver. O. B. 1786, p. 814.

Justices on suspicion may hear and punish.

Officers may apprehend.

“ fence, or to petit larceny only (except where the person or persons actually committing the felony, shall have been already convicted of grand larceny, or of some greater offence) every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken or stolen, shall be held and deemed guilty of, and may be prosecuted for a misdemeanor, and shall be punished by fine, imprisonment, or whipping, as the court of Quarter Sessions, who are hereby empowered to try such offender, or as any other court before which he, she, or they shall be tried, shall think fit to inflict; although the principal felon, or felons (a) be not before convicted of the said felony, and whether he, she, or they is, or are amenable to justice or not. And in cases where the felony actually committed, shall amount to grand larceny, or to some greater offence, and where the person or persons actually committing such felony, shall not be before convicted, such offender or offenders, shall be exempted from being punished as accessory or accessories, if such principal felon, or felons shall be afterwards convicted.”

† *Sec. 12.* And it is further enacted, “ That it shall be lawful for any one justice of the peace, upon complaint made before him upon oath, that there is reason to suspect that stolen goods are knowingly concealed in any dwelling-house, out-house, garden, yard, croft, or other place or places, by warrant under his hand and seal, to cause every such dwelling, or place to be searched in the day time, and the person knowingly concealing the said stolen goods, or any part thereof, or in whose custody the same, or any part thereof shall be found, he, she, or they being privy thereto, shall be deemed guilty of a misdemeanor, and shall be brought before any justice of the peace for the county or place, and made amenable to answer the same, by like warrant of any such justice, and on conviction shall be punished as aforesaid.”

† *Sec. 13.* And it is further enacted, “ That every constable, headborough, or tything-man, in every county or place, where they shall be officers, and every beadle within his ward, or district, and every watchman while on duty, shall and may apprehend those who may be suspected of conveying, after sun-setting, and before sun-rising, any goods or chattels suspected to be stolen; and the same, together with such person or persons, as soon as conveniently may be, to convey or carry before any justice for the county or place, to be dealt with according to law, and on conviction, they shall be held guilty of a misdemeanor, and imprisoned not exceeding six calendar months, nor less than three calendar months.”

Sec.

Stat. 14. It is also enacted by the said statute, "That every person to whom any goods or chattels which have been feloniously stolen, or taken, shall be brought and offered to be sold, pawned, or delivered, shall on reasonable cause for suspicion, apprehend, and carry before a justice for the county or place, where the same shall be so offered, the person and persons bringing, or offering the same."

For the pardon allowed to such as shall discover receivers of stolen goods, vide second book, tit. "pardon."

APPENDIX THE EIGHTH.

OF THE OFFENCES OF RETAKING, AND ADVERTISING A REWARD FOR, STOLEN GOODS.

† It is enacted by 4 Geo. 1. c. 11. s. 4. "That wherever any person taketh money, or reward, directly or indirectly, under pretence, or upon account of helping any person or persons, to any stolen goods or chattels, every such person so taking money or reward, as aforesaid, (unless such person doth apprehend, or cause to be apprehended, such felon who stole the same, and cause such felon to be brought to his trial for the same, and give evidence against him) shall be guilty of felony, and suffer the pains and penalties of felony, according to the nature of the felony committed in stealing such goods, in such and the same manner as if such offender had himself stole such goods and chattels, in the manner, and with such circumstances, as the same were stolen." — And by 6 Geo. 1. c. 23. "Whoever shall prosecute an offender upon this statute, to conviction of felony, without benefit of clergy, shall be intitled to a reward of forty pounds."

Post. c. 59. s. 3.
1 Hale 620.
Upon this clause the famous Jonathan Wild was convicted and executed, 10 Geo. 1.

† *Stat. 2.* And it is further enacted by 25 Geo. 2. c. 36. made perpetual by 28 Geo. 2. c. 19. s. 1. "That any person publicly advertising a reward, with no questions asked, for the return of things which have been stolen or lost, or making use of any words in such publick advertisement, purporting that such reward shall be given, or paid, without seizing, or making enquiry after the person producing such thing so stolen, or lost, or promising or offering in any such publick advertisement, to return to any pawnbroker, or other person, who may have bought or advanced money by way of loan upon such thing so stolen, or lost, the money so paid or advanced, or any other sum of money, or reward for the return of such thing; and any person printing, or publishing such advertisement, shall respectively forfeit the sum of fifty pounds for every such offence, to any person who will sue for the same."

Theftbait is an offence at common law, highly criminal, as being a sort of compounding or felony, and punishable by fine and imprisonment. Vide 1 Hale 546.
Post. c. 59. s. 7.
B. 2. c. 29. s. 30.

For the restitution of stolen goods to the owner, vide index, "Restitution," and 4 Bama 53.

APPENDIX THE NINTH.

OF OFFENCES BY MALICIOUSLY DESTROYING
GARMENTS, HOP-BINDS, COAL-MINES, AND
MINE-ENGINES.

- Garments. † **F**IRST. It is enacted by 6 Geo. 1. c. 23. s. 11.
 " That if any person or persons, shall at any time or
 " times, wilfully and maliciously assault any person or persons
 " in the publick streets, or highways, with an intent to tear,
 " spoil, cut, burn, or deface, and shall tear, spoil, cut, burn
 " or deface the garments, or cloaths of such person or persons,
 " such offenders shall be guilty of felony, and transported for
 " seven years."
- Hop-binds. † *Set.* 2. Secondly, It is enacted by 6 Geo. 2. c. 37. s. 6.
 " That if any person or persons, during the continuance of
 " the 9 Geo. 1. c. 22. (which is made perpetual by 31 Geo.
 " 2. c. 42.) shall unlawfully and maliciously cut any hop-
 " binds growing on poles, in any plantation of hops, every
 " person or persons so offending, shall suffer death without
 " benefit of clergy."
- Coal-mines. † *Set.* 3. Thirdly, It is also enacted by 13 Geo. 2. c. 21.
 " That if any person shall divert, or convey any water into any
 " coal-work, with design to destroy, or damage the same,
 " he shall pay to the party grieved, treble damages, with
 " costs"
- Mine engines. † *Set.* 4. Fourthly, It is also enacted 9 Geo. 3. c. 29. s. 2.
 " That if any person or persons shall at any time wilfully or
 " maliciously set fire to, burn, demolish, pull down, or otherwise
 " destroy, or damage any fire-engine, or other engine for
 " draining water from collieries, or coal mines, or for drawing
 " coals out of the same; or for draining water from any
 " mine of lead, tin, copper, or other mineral; or any bridge,
 " waggon-way, or trunk, for conveying coals from any
 " colliery, or coal mine, or staith for depositing the same;
 " or any bridge, or waggon-way for conveying lead, tin,
 " copper, or other mineral from any such mine, erected or to
 " be erected, or any fence, or fences, for dividing or inclosing
 " any common ground, or waste land, set up, provided, or
 " made in pursuance of any acts of parliament, such offenders
 " shall be transported for seven years, provided the prosecution
 " be commenced within eighteen months after the offence
 " committed."

APPENDIX THE TENTH.

OF OFFENCES IN DESTROYING LOOMS, &c. IN
CERTAIN BRANCHES OF MANUFACTURE.

† IT is enacted by 12 Geo. 1. c. 34. s. 6. "That whoever shall assault or abuse any master wool-comber or master weaver, or other person concerned in any of the woollen manufactures of this kingdom, whereby any such master or other person shall receive any bodily hurt for not complying with, or not conforming, or not submitting to any such illegal by-laws, ordinances, rules or orders *as are mentioned in the act*; or whoever shall write, or cause to be written, or knowingly send, or cause to be sent, any letter or other writing or message, threatening any hurt or harm to any such master wool-comber or master weaver, or other person concerned in the woollen manufacture; or threatening to burn, pull down, or destroy any of their houses or out-houses, or to cut down or destroy any of their trees, or to maim or kill any of their cattle for not complying with any demands, claims, or pretences of any of his or their workmen, or others employed by them in the said manufacture, or for not conforming or not submitting to any such illegal bye-laws, &c. as aforesaid, shall, on conviction, upon any indictment, to be found within twelve calendar months after the offence committed, be transported for seven years.

Master wool-comber.
Vide 3 Hen. 6.
c. 1.
Vide 19 Geo. 2.
c. 33.
30 Geo. 2. c. 19.

† "And by 22 Geo. 2. c. 27, the above clause is extended to journeymen dyers, journeymen hot-pressers, and all other persons employed in or about any of the woollen-manufactures; or in the making of felts or hats; or in the manufactures of silk, mohair, furr, hemp, flax, linnen, cotton, fustian, iron, or leather; or in or about any manufactures made up of wool, furr, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another. But by 13 Geo. 1. c. 23. s. 17. all prosecutions shall be within three months after the offence committed."

Journeymen.

† Sect. 2. It is also enacted, by 4 Geo. 3. c. 37. s. 16. "That whoever shall break into any house, shop, cellar, vault or other place or building, or by force enter into any house, shop, cellar, vault, or other place or building, with intent to steal, cut or destroy any linnen yarn, or any linnen cloth, or any manufacture of linnen-yarn, belonging to any manufactures, or the looms, tools, or implements used therein; or shall wilfully or maliciously, cut in pieces or destroy any such goods, either when exposed to bleach

Linnen yarn.

" or

“ or dry, shall suffer as in cases of felony without benefit of clergy. But this act shall not extend to Scotland or Ireland.”

Woollen goods † *Sec. 3.* And it is enacted by 22 Geo. 3. c. 40. “ That whoever shall by day, or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any serge, or other woollen goods in the loom, or any tools employed in making thereof; or shall wilfully and maliciously cut or destroy any such serges, or woollen goods, in the loom, or on the rack; or shall burn, cut, or destroy any rack on which any such serges, or other woollen goods are hanged in order to dry; or shall wilfully and maliciously break, or destroy any tools used in the making any such serges, or other woollen goods, not having the consent of the owner so to do, shall be guilty of felony without benefit of clergy.”

Silk goods. † *Sec. 4.* And it is further enacted by the said statute par. 2. “ That whoever, by day or by night, shall break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any velvet, wrought silk, silk mixed with any other materials, or other silk manufacture, in the loom, or any warp, or shuttle, tools, tackle, or utensils; or shall wilfully or maliciously cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture in the loom, or any warp or shuttle, tools, tackle, or utensils prepared or employed, in, or for the making thereof; or shall wilfully and maliciously break or destroy any tools, tackle, or utensils, used in, or for the weaving or making of any such velvet, wrought silks, or silks mixed with other materials, or other silk goods, or silk manufacture, not having the consent of the owner so to do, shall be guilty of felony, without benefit of clergy.”

Linnen and cotton goods. † *Sec. 5.* And it is further enacted by the said statute par. 3. “ That whoever, by day or by night, shall break into any house or shop, or enter by force into any house or shop, with intent to cut and destroy any linnen or cotton, or linnen and cotton mixed with any other materials, or other linnen or cotton manufactures, in the loom; or any warp or shuttle, tools, tackle, and utensils; or shall wilfully and maliciously cut, or destroy any linnen or cotton, or linnen or cotton mixed with any other materials, or other linnen and cotton manufactures in the loom, or any warp or shuttle, tools, tackle, and utensils, prepared for, or employed in the making thereof, or shall wilfully and maliciously break and destroy any tools, tackle, and utensils, used in and for the carding, spinning, weaving, preparing, or making in any way

“ way whatever, any such linnen or cotton, or linnen or cotton
 “ mixed with any other materials, or other linnen and cotton
 “ goods, or linnen and cotton manufactures whatsoever, not
 “ having the consent of the owner so to do, shall be guilty
 “ of felony without benefit of clergy.”

Vide 1 Black.
 304, how far
 Scotch manu-
 facture is the
 manufacture of
 England.

APPENDIX THE ELEVENTH.

OF OFFENCES IN NOT PERFORMING QUARANTINE.

† **I**T is enacted by 26 Geo. 2. c. 26. “ That all ships and
 “ vessels arriving, and all persons, goods, and merchan-
 “ dizes coming or imported from any place from whence the
 “ privy council shall judge it probable that the infection may be
 “ brought, shall be obliged to make their quarantine in such
 “ place, for such time, and in such manner as shall be directed
 “ by the king’s order in council, ratified by proclamation, or
 “ published in the *Gazette*, and that during such appointed pe-
 “ riod, no person, goods, or merchandizes, shall come, or be
 “ brought on shore, or go, or be put on board any other ship,
 “ or vessel, without permission, and under such regulations,
 “ as shall be ordered by the king in council, as aforesaid.”

Vide † Jac. c.
 31. 7 Geo. 1.
 c. 3. 8 Geo. 1.
 c. 8. continued
 by 21 Geo. 3.
 c. 29. s. 6. †
 Geo. 2. c. 13.
 6 Geo. c. 34.
 26 Geo. 2. c. 6.
 28 Geo. 2. c. 6.
 for other provi-
 sions respecting
 quarantine, vide
 33 Geo. 2. c. 16.

† *Self.* 2. And it is further enacted by par. 2. “ That if the
 “ plague shall appear on board any ship, being to the north-
 “ ward of Cape Finisterre, the commander shall immediately
 “ proceed, by 29 Geo. 2. c. 8. to the harbour of St. Helens
 “ Pool, or to such other place as the privy council shall ap-
 “ point, and from thence cause intelligence of the condition
 “ of his ship to be given to the secretary of state. But if he
 “ shall not be able to make Scilly, or is forced to go up either
 “ of the Channels, he shall not presume to enter with such ship
 “ into any port, but shall remain in some open road, avoid-
 “ ing all intercourse whatever, with other ships, until the
 “ king’s pleasure be known, on pain of being adjudged
 “ guilty of felony without benefit of clergy.”

† *Self.* 3. And it is further enacted par. 3. “ That whenever
 “ any country is infected with the plague, or the privy council
 “ shall as aforesaid, have made any order for performing of
 “ quarantine, the officer appointed for the purpose, shall at
 “ a convenient distance, as often as any ship or vessel, shall
 “ attempt to enter any port or place, demand of the comman-
 “ der every particular (as specified in the act) concerning
 “ the same, and in case it shall appear that any person then on
 “ board such ship or vessel, shall at the time of such examination

“ be actually infected with the plague, or that such ship is
 “ obliged to perform quarantine, having come from any place
 “ visited with the plague, any of the king’s ships, &c. may
 “ by force and violence oblige her to repair to the place
 “ appointed for performing quarantine. And in case the com-
 “ mander of such ship or vessel, conceal the same, he
 “ shall suffer death without clergy. And in case such
 “ commander do not make a true discovery in any other of the
 “ particulars directed by the act, he shall forfeit 200l. and if
 “ he do not repair to the place appointed, 500l. And any
 “ persons who attempt to quit the vessel, shall be obliged
 “ to return, suffer imprisonment for six months, and for-
 “ feit 200l.”

† Sect. 4. And by par. 8. “ If any person obliged to
 “ perform quarantine, as aforesaid, shall wilfully refuse or ne-
 “ glect to repair, within convenient time, after notice, to
 “ the house, lazaret, or other place, (as directed by the act to
 “ be provided) or having been placed therein, shall escape, or
 “ attempt to escape out of the same before *quarantine* fully per-
 “ formed, it shall be lawful for the officer appointed, by force,
 “ to compel his return, and every person so refusing, or ne-
 “ glecting to repair after such notice as aforesaid, into such
 “ house, lazaret, or other place; and also every person actually
 “ escaping as aforesaid, shall suffer death without clergy.”

† Sect. 5. And it is further enacted by the said statute, par.
 10. “ That if any person not infected with the plague, nor
 “ liable to perform quarantine, shall enter any house, la-
 “ zaret, or other place, appointed as the act directs, whilst any
 “ person or persons infected with the plague, or being under
 “ quarantine shall be therein, and shall return, or attempt to
 “ return, from thence without permission, by order of privy
 “ council, the officer may compel him to return. And in case
 “ such person shall actually escape out of such house, lazaret, or
 “ place appointed as the act directs, before the full perfor-
 “ mance of quarantine, he shall suffer death without clergy.
 “ If the officer neglects his duty, he shall forfeit 100l. and if
 “ he embezzle any goods, he shall pay treble damages.”

† Sect. 6. And it is further enacted par. 18. “ That if any
 “ person or persons, shall knowingly, or wilfully, con-
 “ ceal from the officers of *quarantine*, or shall clandestinely
 “ convey any letters, goods, wares, or merchandizes from any
 “ ship under *quarantine*, or liable to perform quarantine as
 “ aforesaid, or from any lazaret, or other place where goods
 “ shall be performing *quarantine*, every such offender shall suf-
 “ fer death without clergy.”

A P P E N D.

APPENDIX THE TWELFTH.

OF HINDERING THE EXPORTATION OF CORN;

† **I**T is enacted by 11 Geo. 2. c. 22. "That whoever shall
 " wilfully and maliciously beat, wound, or use any other
 " violence to or upon any person or persons, with intent to To assault with
 intent to hinder
 a misdemeanour.
 " deter or hinder him or them from buying of any corn or
 " grain in any market or other place within this kingdom;
 " or shall unlawfully stop or seize upon any waggon, cart,
 " or other carriage, or horse loaded with wheat, flour, meal,
 " malt, or other grain, in or on the way to or from any city,
 " market-town, or sea port of this kingdom, and wilfully and
 " maliciously break, cut, separate, or destroy the same, or
 " any part thereof, or the harness of the horses drawing the
 " same; or shall unlawfully take off, drive away, kill, or
 " wound any such horses, or unlawfully beat or wound the
 " driver or drivers of such waggon, cart, or other carriage,
 " or horse so loaded, in order to stop the same; or shall, by
 " cutting of the sacks, or otherwise, scatter or throw abroad
 " such wheat, flour, meal, malt, or other grain, or shall
 " take, or carry away, spoil, or damage the same or any part
 " thereof; on conviction by two justices of the peace, or at
 " sessions, shall be sent to the common gaol, or house of cor-
 " rection, to hard labour, not exceeding three months, nor
 " less than one, and be once publicly whipped during the
 " said confinement."

† *Sect. 2.* And it is further enacted, par. 2. "That if any A second offence,
 or to destroy any
 granary, &c.
 felony.
 " such person or persons so convicted shall commit any of the
 " offences aforesaid a second time, or if any person or persons
 " shall wilfully and maliciously pull, throw down, or other-
 " wise destroy any store-house or granary, or other place where
 " corn shall be then kept, in order to be exported; or shall
 " unlawfully enter any such store-house, granary, or other
 " place, and take and carry away any corn, flour, meal, or
 " grain therefrom, or shall throw abroad or spoil the same, or
 " any part thereof; or shall unlawfully enter on board any
 " ship, barge, boat, or vessel, and shall wilfully and malici-
 " ously take and carry away, cast, or throw out therefrom,
 " or otherwise spoil or damage any meal, flour, wheat, or
 " grain therein, intended for exportation, every person so
 " offending, shall, on conviction, be transported for seven
 " years; and if such convict shall return, &c. he shall suffer
 " death as a felon, without benefit of clergy; but without
 " corruption of blood, loss of dower, or disinherittance."

The hundred
liable.

† *Stat.* 3. And it is further enacted, “ That the hundred
“ where any such offence shall be committed, shall make full
“ satisfaction and amends, not exceeding one hundred pounds,
“ to any party injured, or their representatives, for the
“ damages they sustain by any offender against this act, to be
“ recovered as directed by the statute of hue and cry, 27
“ *Eliz. c.* 13. But the party shall give notice to a constable
“ within two days after the fact; and before the expiration of
“ ten days after such notice, shall give in his examination as
“ the act directs; and if any one of the offenders be convicted
“ within twelve months, the hundred is released. No actions,
“ therefore, shall be brought before the expiration of one
“ year, nor after the expiration of two years.”

APPENDIX THE THIRTEENTH.

OF THE OFFENCE OF RETURNING FROM TRANSPORTATION.

Transportation
to America.

(1) If the condition of the king's pardon shall be, that he departs the realm within fourteen days from the day of his discharge from prison, it has been ruled that the daily book which is kept by the clerk of the papers for the prison in which the discharges and commitments are entered, is admissible evidence to prove the time and fact of the discharge, altho' it is the duty of another officer to discharge the prisoners, and the clerk of the papers has no personal knowledge of the fact. *O. B.* 1785, p. 1137, 1138.

† **A**LL offenders convicted of grand or petit larceny, or any other felonious taking, except the buying or receiving of stolen goods, whose crimes are *within* the benefit of clergy, and for which they are liable only to be burned in the hand or whipped; and also all offenders whose crimes, on conviction, exclude them from the benefit of clergy, to whom his majesty shall extend his royal mercy, on condition of *such* transportation, (1) signified under the great seal, by one of the principal secretaries of state, shall, and may be transported to America (2) for seven years; and all offenders convicted of knowingly buying or receiving stolen goods, to whom such conditional mercy shall be extended, generally shall be transported to America for the term of fourteen years, or such other term as shall be made part of such condition. And it is thereupon further enacted, by 4 *Geo.* 1. c. 11. s. 2. “ That if any offender or
“ offenders so ordered to be transported for any term of seven
“ years or fourteen years, or other time or times as afore-
“ said, shall return into any part of Great Britain or Ireland,
“ before the end of his or their said term, he or she so return-
“ ing as aforesaid, shall be liable to be punished as any person
“ attainted of felony without the benefit of clergy, and exe-
“ cution shall and may be awarded against such offender or

(2) And it has been determined by all the judges, upon a question arising on the fishing act, referred by *Mr. Justice Bathurst*, that when an act of parliament says generally that an offender shall be transported, without saying where, it shall be to America. *O. B.* 1785, p. 1142.

“ offenders

"offenders accordingly." Provided nevertheless, "That the king may at any time pardon, and dispense with any such transportation, and allow of the return of any such offender or offenders from America, upon the terms as described in the act."

† *Sec. 2.* And whereas some felons ordered for transportation, have already, and others may, come on shore, and return to Great Britain before they have been actually transported to America, or may break gaol, or escape before such transportation. It is thereupon enacted, by 6 Geo. 1. c. 23. s. 6. "That if any felon or felons who shall be ordered for transportation, shall be afterwards at large within Great Britain, without some lawful cause, before the expiration of the term for which such felon or felons was, were, or shall be ordered to be transported, all and every such person and persons, being thereof lawfully convicted, (3) shall suffer death as in cases of felony, without benefit of clergy."

(3) If the prisoner, upon his trial, confess the fact, and acknowledge he is

the man, the court will record his confession. O. B. 1784, p. 56. But, otherwise, the record of his conviction must be produced; it must correspond with the averments in the indictment, and evidence must be given of his identity. O. B. 1785, p. 1137.

† *Sec. 3.* And to the intent that such conviction may be as little trouble as possible, It is further enacted by par. 7. *Made of trial.* "That such offender may be tried either before justices of assize, oyer and terminer, or gaol delivery for the county, city, or place from whence he was ordered to be transported; and that the clerk of the assize and the clerk of the peace where such orders for transportation shall be made, shall, at the request of the prosecutor, or any other in his majesty's behalf, certify a transcript, briefly and in few words, containing the effect and tenor of every indictment and conviction of such man or woman, and of the order or contract for his or her transportation, to the justices of assize, oyer and terminer, or gaol delivery where such man or woman shall be indicted; which shall, on production of it, be a sufficient proof of the former conviction and order for transportation."

† *Sec. 4.* And whereas many felons who have agreed, upon certain conditions, to transport themselves, either for life, or for some term or number of years, have already, and may hereafter come on shore or return, It is enacted, by 16 Geo. 2. c. 15. "That if any felon or other offender already ordered, or hereafter to be ordered for transportation, or who hath already, or hereafter shall agree to transport him or herself, on certain conditions, to America, either for life or any number of years, shall be afterwards at large, without in any part of Great Britain, without some lawful cause,

Convicts transporting themselves, &c.

“ before the expiration of the term for which he or she were
 “ so ordered to be transported, or hzd so agreed to transport
 “ him or herself; all and every such person or persons being
 “ thereof lawfully convicted, shall suffer death without benefit
 “ of clergy.”

† *Sett.* 5. Whereas offenders excluded from the benefit of
 elergy are frequently reprieved by the judge who tries them,
 and, upon his recommendation, may receive mercy on con-
 dition of transportation to America for life or for the term of
 fourteen years; it is enacted by 8 Geo. 3. c. 15, “ That
 where, upon such recommendation, such offenders shall re-
 ceive mercy as aforesaid, signified by a principal secretary
 of state, to the judge so recommending, it shall be lawful
 for every such judge to make an order for the immediate
 transportation of every such offender, which shall be as
 good and effectual, and be considered as if the same had been
 made during the continuance of the assizes at which such
 offender was, or shall be convicted.” “ But if such offender
 “ so ordered for transportation shall be afterwards at large,
 “ within any part of Great Britain, without some lawful
 “ cause, (4) before the expiration of the term for which such
 “ offender shall have been ordered to be transported, every
 “ such person being thereof lawfully convicted, shall suffer
 “ death without benefit of clergy, and shall be tried in like
 “ manner as *other felons* found at large before the expiration
 “ of their term.”

(4) Maximilian Miller was convicted at O. B. January sessions, 1771, and ordered for transportation for seven years. He obtained mercy, under the sign manual, on condition of his giving security to the satisfaction of the Recorder to transport himself for that term. He gave the security, and was accordingly admitted to bail, but did not go abroad. In December sessions following he was indicted capitally for being at large, &c. He offered the sign manual in evidence, but that being rejected, he was found guilty, subject to the opinion of the judges. First, Whether the sign manual ought to have been received? Secondly, Whether it could have availed the prisoner, as he had not substantially performed the conditions of his pardon? All the judges, except De Grey, C. J. were unanimous that the evidence ought to have been received; and that the prisoner having complied with the literal import of the condition, by giving the security, which authorized the judge to bail him, it was a *good cause* for him to appear at large, and therefore ought not to have been convicted. Black, 737. It is said, however, that no judicial determination was ever communicated upon this case, but that the prisoner was, in fact, remanded to his former sentence. O. B. 1785, p. 1140, 1145. And this appears to be the practice, vice Patrick Madan's case. And the case of Aikles, O. B. 1785, No. 902.

Transportation
beyond the seas.

Continued to
the 1st of June,
1787, by 24
Geo. 3. c. 56.

† *Sett.* 6. But America having at length separated from its
 connection with Great Britain, The punishment of felons
 and other offenders by transportation to the plantations, was
 attended with many difficulties. And it is therefore en-
 acted by 19 Geo. 3. c. 74. “ That when any person in Eng-
 “ land, or Wales, shall be lawfully convicted of grand or petit
 “ larceny, or any other crime for which he is liable to be
 “ transported to America, such person shall, if the court shall
 “ think fit, be ordered to be transported to any parts beyond
 “ the

" the seas, whether the same be situated in America, or else-
 " where, in such and the like manner, and for the same term,
 " as, and for which such person is, or shall be liable to be
 " transported to America."

Barrington on
 the Statutes, p.
 445, to 447.

† *See*. 7. And it is further enacted by the said statute, par.
 2. " That when any such person, who shall be so convicted,
 " shall, in consequence thereof, be ordered to be transported
 " to any parts beyond the seas. Or if his majesty shall extend
 " his mercy to any offender, convicted or attainted of any fe-
 " lony excluded from clergy, upon condition of (a) transporta-
 " tion to any parts beyond the seas, as aforesaid, then in any such
 " cases all laws, statutes, usages, and customs now in force;
 " with regard to transportation to America, and their punish-
 " ment for being afterward at large, within any part of Great
 " Britain, before the expiration of the several terms for which
 " they were ordered to be transported, or had agreed to trans-
 " port themselves, and particularly the several provisions con-
 " tained in the 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 16 Geo.
 " 2. c. 15. and the 8 Geo. 3. c. 15. shall take place and be in
 " force and enure, with regard to the transportation of such of-
 " fenders, and with regard to their punishment for being after-
 " wards at large as aforesaid, in like manner as if the same had
 " been repeated, and specially inserted in this act." (5)

(a) For the
 form in which
 conditional por-
 dons are now
 worded, vide
 B. 2. c. 37.

(5) Aikles was convicted, O. B. January sessions, 1784, of felony *within the benefit of clergy*, and received sentence of transportation, according to the directions of this act, for seven years. He received his majesty's pardon " on condition of departing the realm within fourteen days after his discharge, giving security to the satisfaction of the Recorder to do." He gave the security required; and in consequence thereof was discharged out of Newgate on the 9th of March, 1785, by virtue of a warrant under the hand and seal of the Recorder. On the 26th of May following, he was apprehended, and afterwards indicted for being at large in Great Britain before the expiration of the term, without any lawful cause, &c. Upon these facts being proved, several questions of law arose.—The 16 Geo. 2. c. 15, inflicts death upon the return of any felon " who shall have agreed to transport himself to America." Aikles had only agreed to transport himself *beyond the seas*.—The 10 Geo. 3. c. 74, inflicts death upon the return of any offender convicted of any crime for which he was liable, by the former acts, to be transported to America, " who shall, in consequence thereof, be ordered to be transported to parts beyond the seas." Aikles had not been transported beyond the seas in consequence of a conviction which rendered him liable to be transported to America. He had agreed to transport himself in consequence of the king's pardon, &c.; a case for which the act has made no express provision. The 19 Geo. 3. c. 74, inflicts death upon the return of any offender " convicted of felony, excluded from clergy, to whom his majesty shall extend mercy on condition of transportation." But Aikles had received conditional mercy, on conviction of an offence *within the benefit of clergy*. It was therefore contended that the prisoner was not, *immediately*, within the operation of these statutes. But Aikles had broken the condition of the king's pardon, in not departing the realm within fourteen days from his discharge; and upon the argument in this case, it seems to be the opinion, that the whole grant was, in consequence of the violation, a mere nullity and entirely done away. This consideration gave birth to the questions whether the prisoner was not then a person within these words of 19 Geo. 3. " lawfully convicted of a crime for which he is liable to be transported to America, and who, in consequence thereof, had been ordered to be transported beyond the seas." But it was contended, upon the authority of Mille's case before mentioned, that, having complied with a part of the condition, by giving security, which, though otherwise expressed, must necessarily be precedent; the legal discharge obtained in consequence of it, by virtue of the Recorder's warrant, formed a *lawful cause for being at large*, which was not interrupted by the violation of the further condition, " that he should depart the realm within fourteen days, &c." These several questions furnished ingenuity with argument, and produced the sentiments of judges, highly respectable indeed, upon points of criminal law; but this question never came to an ultimate decision. It appeared upon further evidence, that the prisoner had a real intention to quit the kingdom, which had been defeated by unaffected poverty, distress, and ill health. The jury, under the direction of the court, thought these circumstances amounted to a legal excuse, and the prisoner was accordingly acquitted, and remanded to his former sentence. O. B. 1785, No. 901.

Labour on board
the hulks.

† *Sec. 8.* It is also enacted by par. 27. " That male offenders, convicted of any crime, except petit larceny, for which they are liable to transportation, may in lieu thereof, if the court shall think fit, be punished by being kept on board ships or vessels, (commonly called the hulks) and employed in raising sand, soil, or gravel from the river Thames, &c. &c. for such term, not less than one year, nor exceeding five years. Or, in case such offender shall be liable to be transported for fourteen years, not exceeding seven years, as the court shall think fit to order and adjudge."

(a) Vide the
act.

† *Sec. 9.* And it is also enacted par. 28. " That where any male offender shall be lawfully convicted of any robbery, or other felony without benefit of clergy, and mercy, notified in writing, by a secretary of state as aforesaid, shall be extended to such offender, upon condition of being kept to hard labour, during any specified term, such mercy may be allowed in the same manner, as if there was a conditional pardon, under the great seal, and the court (a) may, and shall order such offender to be kept to hard labour, as aforesaid, for the time specified in the notification from the secretary of state."

N. B. This act inflicts the punishment of death upon those who being ordered to hard labour instead of being capitally punished, in any of the places of confinement mentioned in the act, shall break from their keepers or escape.

But, as this part of the act was never carried into execution, the insertion of it is omitted.

Transportation
to such places as
the king shall
appoint.

† *Sec. 10.* It is therefore further enacted by the said statute of 19 Geo. 3. c. 74. " That if any person who hath been ordered to hard labour, instead of transportation, shall break from the custody of the keepers, or escape, they shall be punished by an addition of three years to the term for which he, or she, at the time of his, or her breach of prison, or escape was subject to be confined, and if such person so punished by such addition to the term of confinement, shall afterwards be convicted of a second escape, or breach of prison, he or she shall be adjudged guilty of felony, without benefit of clergy."

† *Sec. 11.* But the difficulty of immediately finding proper places, beyond the seas, for the purposes of transportation; and it being found impracticable to carry all the provisions of the 19 Geo. 3. effectually into execution. It is enacted by 24 Geo. 3. *sec. 2.* c. 56. which has continuance to the 1 June 1787, That where offenders shall be convicted at the assizes, or sessions, in the manner, and under the circumstances before mentioned, set forth more at large, under title transportation at the end of chapter 33, in the second book, " of offences for which such offenders shall be liable to be transported, &c. it shall, and may be lawful for the court to order and adjudge, that such offenders so convicted, shall be transported beyond the seas, for any term of years, not exceeding the number for which they are liable to

" be

" be transported. And that in every such case it shall and may
" be lawful for his majesty, by, and with the advice of his pri-
" vy council to declare and appoint to what place, or places,
" part, or parts beyond the seas, either within his majesty's
" dominions, or elsewhere, out of his majesty's dominions,
" such felons, or other offenders shall be conveyed or trans-
" ported."

† *Sec. 12.* And it is further enacted by par. 5. " That if
" any offender who shall be so ordered, by any such court as
" aforesaid, to be transported beyond the seas, or who shall
" agree to transport himself, or herself, on certain conditions,
" either for life, or any number of years, to any such place, or
" places, part, or parts, as shall be appointed by his majesty,
" in manner aforesaid, shall be afterwards at large in Great
" Britain, or Ireland, without some lawful cause, before the
" expiration of the term for which such offender or of-
" fenders, shall have been ordered to be transported be-
" yond the seas, or shall have so agreed to transport
" himself, or herself, as aforesaid, every such offender being
" at large, as aforesaid, being thereof lawfully convicted, shall
" suffer death without benefit of clergy."

Death to return

N. B. The same
mode of trial is
appointed as by
sect. 3. *supra*.

† *Sec. 13.* And it is further enacted by 25 Geo. 3. c.
46. " That when any person or persons, shall be lawfully
" convicted, before any court competent for the trial of crimes
" in Scotland, of any offence for which the punishment of
" transportation may be inflicted, the court may adjudge such
" person or persons, to be transported beyond the seas, in like
" manner as is now in use, and his majesty, by and with the
" advice of his privy council, may declare and appoint what
" place or parts beyond the seas, either within his majesty's
" dominions, or elsewhere out of his dominions, such offen-
" ders shall be conveyed or transported."

Offenders in
Scotland may be
transported.

Sec. 14. And it is also further enacted, " That when
" his majesty shall extend his mercy to any offender under
" sentence of death in Scotland upon condition of transpor-
" tation, signified by one of the principal secretaries of state,
" it shall be lawful for any court, having authority, to allow
" such offender, the benefit of a conditional pardon,
" and (except in cases where such offender shall be autho-
" rized by his majesty to transport himself) to order the same
" in the manner the act describes."

Judges may
allow a pardon
on that condi-
tion.

† *Sec. 15.* And it is further enacted, " That if any offen-
" der in Scotland, ordered for transportation, and such order
" cannot be conveniently executed, with respect to the place in
" such order mentioned, it shall be lawful for any two or more of
" the judges of the court of Justiciary, to order that such offen-

To such places
as his majesty
shall appoint.

u. 1807

Returning,
death without
clergy.

“ der shall be transported to any other part beyond the seas,
“ which shall have been appointed by his majesty as aforesaid.”

+ Stat. 16. And it is enacted by par. 3. “ That if any of-
“ fender or offenders, who shall be so ordered by such court as
“ aforesaid, to be transported beyond the seas, or who shall
“ agree to transport himself or herself, on certain conditions,
“ as aforesaid, or who shall be so ordered by two judges of
“ the Justiciary, shall be afterwards at large in Great Britain
“ or Ireland, without some lawful cause, before the expiration
“ of the term for which such offender shall have been ordered
“ to be transported beyond the seas, or shall have so
“ agreed to transport himself, or herself, or shall have been
“ so ordered by two justices of the court of Justiciary, as
“ aforesaid, every such offender, on being thereof lawfully con-
“ victed, shall suffer death as in cases of felony, without the
“ benefit of the clergy, by the law of England; and such offen-
“ der being found at large in Scotland may be tried there be-
“ fore any court of competent jurisdiction for the trial of the
“ original offence.”

APPENDIX THE FOURTEENTH.

OF ASSAULT WITH INTENT TO ROB.

THE old maxim of the criminal law, that *voluntas reputabitur pro facto* (a) continued to prevail in the reign of Henry the Fourth; and it was then agreed that if a man was indicted that *il gisoit depraadando* it was felony (b)—But in the ninth year of Edward (c), a different doctrine began to be held; and men were no longer punished for crimes which they only meditated, but had not actually committed (d); and since that time the bare intention to commit a felony has been considered as a misdemeanor only, and punishable by fine, imprisonment, &c. (e)

(a) 25 Edw. 3. Pl. 32.
 27 Affize 38.
 1 Hale 532.
 (b) Year book, 23 Hen 4. 85.
 (c) Year book, pl. 26. b.
 S. P. C. 27. b.
 (d) Reeves' History of English law, 3 vol. p. 413.

(e) Plowden 259. Cases tempus Hardwick, 3 Inst. 68.

Stat. 1. But the punishment as a misdemeanor, not being found sufficiently terrific to restrain the frequency of the offence it is recited by 7 Geo. 2. c. 22. that whereas many of his majesty's subjects have of late frequently been put in fear and danger of their lives, by wicked and ill disposed persons, assaulting and attempting to rob them; and whereas the punishment of such offenders is not adequate to the heinousness of the crime, nor sufficient to deter wicked persons from such attempts; to the end therefore that all persons may be deterred from committing such offences, and for the greater punishment of such offenders, and for the more effectually preventing the like mischiefs in future. It is enacted, "that if any person or persons, with any offensive weapon, or instrument unlawfully and maliciously, shall assault, or shall by menaces, or in or by any forcible or violent manner, demand any money, goods or chattels, of or from any other person or persons, with a felonious intent to rob, or commit robbery upon such person or persons, that then the offender, &c. shall be adjudged liable to be transported for seven years."

Stat. 2. And it is also enacted, "That if such offender shall break gaol, or escape before transportation, or return before the expiration of the seven years, he shall suffer death without benefit of clergy."

Upon

OF ASSAULT WITH INTENT TO ROB.

Upon this act the following constructions have been made.

† *Sec. 3.* First, that to compleat the crime not only the assault, as by holding a pistol towards a coachman on his box and telling him to stop, but a demand of the money or other property must also actually be made.—But in this case (a) it was said by *Mr. Justice Chapple*, who tried the prisoner, that the demand need not be made in *express* terms, for that a dumb man may make a demand, as if he stop a person on the highway, and put his hat into the coach with a pistol in his hand.

(a) The case of Peter Perfait, O. B. Dec. Sess. 1740. present Ch. Jus. Willes who accorded to Chapple's opinion, and the prisoner was thereupon acquitted, M. S. Vide Haward's case, O. B. 1783. No. 538.

† *Sec. 4.* Secondly, that both the assault and the demand must be made upon the person intended to be robbed, for the words of the act are “that if any person shall assault, &c. and demand the money &c. of any other person, with intent to rob, or commit robbery upon, *such person*.” (b)

(b) Thomas's case. O. B. July Sess. 1784. by Mr. Just. Ashurst.

† *Sec. 5.* Thirdly, that the assault must be made with an offensive weapon, and that the evidence must prove the assault was made with an offensive weapon of the same kind as that which is laid in the indictment.

† *Sec. 6.* Fourthly, that it is not necessary that the indictment should charge the intention to have been, in the very words of the statute “to rob or commit robbery”—it is sufficient if it be laid “with a felonious intent to take his monies from his person and against his will, feloniously to steal, take and carry away” but that it would be more correct if the words “by force or violence” were added (b)

(c) Rook's case, O. B. October Sess. 1785. Mr. Serjeant Adair, Recorder.

CHAPTER THE FIFTY-NINTH.

OF MISPRISION OF FELONY.

OFFENCES more immediately against the subject, not capital, are either misprision of felony, or other inferior offences. 3 Inst. 36.
1 Hale 374, 375;
652, 708.

Sec. 1. It is said, that every felony includes misprision of felony, and may be proceeded against as a misprision only, if the king please, as hath been shewn already in chapter twenty. 1 B. Treas. 25.
2 Rich. 3. 10.
S. P. C. 32.

Sec. 2. But generally misprision of felony is taken for a concealment of felony, (1) or a procuring of the concealment thereof, whether it be felony by the common law, or by statute. Summary 129.
S. P. C. 37. c.
3 Inst. 139.

(1) Silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision. 1 Hale 431, 448, 533. 2 Hale 75. 2 Hawk. c. 12. For a man is bound to discover the crime of another, to a magistrate, with all possible expedition. 3 Inst. 140. So also the concealment of treasure trove, is misprision of felony. 4 Comm. 121. 3 Inst. 133.

Sec. 3. For this offence every common person is punishable by fine and imprisonment at common law. And by the statute of Westm. 3 Edw. 1. c. 9. "If the sheriff, coroner, or any other bailiff within a franchise, or without, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, consent, or procure to conceal the felonies done in their liberties; or otherwise will not attach nor arrest such felons, (there as they may) or otherwise will not do their office, for favour borne to such misdoers, and be attainted thereof, they shall have one year's imprisonment, and after make a grievous fine at the king's pleasure, if they have wherewith; and if they have not wherewith, they shall have imprisonment of three years." B. Treas. 25.
3 Inst. 173.

Sec. 4. By 3 Hen. 7. c. 1. "The justices of the peace of every shire of this realm, for the time being, may take by their discretion an inquest, whereof every man shall have lands and tenements to the yearly value of forty shillings, at the least, to enquire of the concealments of other inquests taken before them, and afore other, of such matters and offences, as are to be enquired and presented afore justices of the peace, whereof complaint shall be made by bill, or by bills, as well within franchise, as without. And if any such concealment be found of any inquest, as is afore rehearsed, had or made within the year after the same concealment, every person of the same inquest to be amerced for the concealment, by discretion of the same justices of the peace; the said amerancements to be assessed in plain sessions."

Sec. 5.

1 Hale 619.
2 S. P. C. 40.
3 Inst. 134.
Summary 130.

Sett. 5. To this title of misprision of felony, that of theft-bote seems not improperly reducible, which is where one not only knows of a felony, but takes his goods again, or other amends not to prosecute.

F. Cbr. 353.
2 Hale 400.
2 And. 47. C.
Eliz. 486. 536.
B. 2. c. 29. f.
16, &c.

Sett. 6. This offence is very nearly allied to felony, and is said to have been anciently punished as such. But at this day it is punishable only with ransom and imprisonment, unless it were accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact.

B. Com. 122. 42
Aff. Sum. 130.
3 R. Abr. 67.
F. Aff. 346.

Sett. 7. But the bare taking of one's own goods again, which have been stolen, is no offence at all, unless some favour be shewn to the thief. (2)

(a) To take any reward for helping any person to stolen goods, is made felony by 4 Geo. 1. c. 11. And to advertise a reward for the return of things stolen, incurs a forfeiture of fifty pounds, by 25 Geo. 2. c. 36. for which vide ante, appendix the eighth.

CHAPTER THE SIXTIETH.

OF SURETY OF THE PEACE.

INFERIOR offences more immediately against the subject not capital, either amount to an actual disturbance of the peace, or do not.

And first I shall consider such offences of this kind, as amount to an actual disturbance of the peace. But before I descend to the several kinds thereof, it may not be improper first to shew what security may be had against the breach of the peace, before it happens.

And in order hereto, I shall examine how the breach may be secured. First, By surety for keeping the peace. Secondly, By surety for the good behaviour.

Dalt. c. 126.
4 Comm. 248.

As to surety for keeping the peace, I shall consider the following particulars: First, In what cases it ought to be taken *ex officio*. Secondly, At whose request it ought to be granted. Thirdly, Against whom it ought to be granted. Fourthly, For what cause it is grantable. Fifthly, In what manner it is grantable by the courts of Chancery and King's Bench. Sixthly, In what manner it is grantable by a justice of peace. Seventhly, In what manner the process for it ought to be executed. Eighthly, How such process may be superseded. Ninthly, What ought to be the form of a recognizance for this

this purpose. Tenthly, How such a recognizance may be discharged. Eleventhly, How such a recognizance ought to be certified and proceeded upon. Twelfthly, How it may be forfeited.

Sec. 1. As to the first point, viz. In what cases surety of the peace ought to be taken *ex officio*; it seems, that any justice of peace may, according to his discretion, bind all those to the peace, who in his presence shall make any affray, or shall threaten to kill or beat any person, or shall contend together with hot words, or shall go about with unusual weapons or attendants, to the terror of the people; and also all such persons as shall be known by him to be common barrators; and also all those who shall be brought before him by a constable for a breach of the peace in the presence of such constable; and all such persons who, having been before bound to keep the peace, shall be convicted of having forfeited their recognizance. (1)

Dalt. c. 67.
153.
Lamb. 77, 78.
9 Ed. 4. 3.
B. Peace, 7, 8.
Crompt. 135.
143.
21 E. 4. 40.
Foster 133.

(1) Conservators of the peace also may grant surety according to their discretion. 4 Burr. 290. And this seems to have been the principal duty of a conservator. 11 St. Tr. 316. A secretary of state, therefore, nor a privy counsellor, ever bind to the peace or the good behaviour, for they are not, as such, conservators of the peace. Lord Holt, indeed, in the case of Kendal and Roe, so considered them; but Lord Camden affirms that no treatise, case, record, or statute, has ever called them conservators of the peace from the beginning of time down to that decision. 22 St. Tr. 317.

Sec. 2. As to the second point, viz. At whose request the surety of the peace ought to be granted; it seems agreed at this day, that all persons whatsoever under the king's protection, being of sane memory, whether they be natural and good subjects, or aliens, or attainted of treason, &c. have a right to demand surety of the peace.

Dalt. c. 68.
Lamb. 78, 79.
Crompt. 133, 134.

Sec. 3. But it has been questioned, whether Jews or pagans, or persons attainted of *præmunire*, have a right to it or not.

Dalt. c. 68.
Lamb. 80.
4 Comm. 250.

Sec. 4. However it is certain, that a wife may demand it against her husband threatening to beat her outrageously, and that a husband also may have it against his wife. (2)

Register 89.
3 Keb. 6. 433.
Ld. Hard. cases,
74.
Strange, 1207.
F. N. B. 80.

Dalt. c. 68. Lamb. 78. Crompt. 133. 3 Lev. 128.

(2) And if the marriage is disputed, the court will order the recognizance to be worded so as not to admit the fact. 5 Tr. 1231.

Sec. 5. As to the third point, viz. Against whom the surety of the peace ought to be granted, there seems to be no doubt but that it ought, upon a just cause of complaint, to be granted by any justice of peace, against any person whatsoever, under

Dalt. c. 68.
Lamb. 81, 82.
Crompt. 134.
3 Keb. 433.
2 Lev. 128.

See the books
above cited, and
Fitz. sub-
juncta 20.

under the degree of nobility, being of sane memory, whether he be a magistrate or private person, and whether he be of full age, or under age, &c. But infants and females covert ought to find security by their friends, and not to be bound themselves; and the safest way of proceeding against a peer is by complaint to the court of chancery or king's bench. (2)

(2) It is said the fear of one cannot be the fear of another, and therefore every recognizance must be separate. *Pult. 18.* but in *Mich. 23 Geo. 2. B. R.* the court allowed three women to file joint articles of the peace against three men. *The King v. Nettle, &c. MSS.*

Dalt. c. 67.
Lamb. 82.
Crom. 135.
1 Lev. 107.
2 Lev. 228.
F. N. B. 801.
Reg. 88.
Moor. 874.
Godb. 215.
1 Keb. 290.

Sec. 6. As to the fourth point, *viz.* For what cause the surety of the peace is grantable; it seems clear, that, wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person; and that every justice of peace is bound to grant it, upon the party's giving him satisfaction upon oath, that he is actually under such fear; and that he has just cause to be so, by reason of the other's having threatened to beat him, or lain in wait for that purpose; and that he does not require it out of malice, or for vexation.

Dalt. c. 67.
Lamb. 82, 83.
Con. 17 Ed. 4.
*4-
B. Peace 22.*
Crom. 134.

Sec. 7. It seems also the better opinion, that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man: And the objection, that one wrongfully imprisoned may recover damages in an action, &c. and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment, and yet there is no doubt, but that one threatened to be beaten may demand the surety of the peace. (3)

(3) And although the fact from which the fear arises be pardoned, the court will receive it as a ground to grant the security upon. *Str. 473.*

See *1 Lev. 53.*
1 Sid. 67.
Skin. 61.
Mullineux case.
Comb. 427.
Bac. Ab.

Sec. 8. As to the fifth point, *viz.* In what manner such surety is grantable by the courts of chancery and king's bench, it is enacted by 21 Jac. 1. c. 8. "That all process for the peace or good behaviour to be granted or awarded out of the same courts, or either of them, against any person or persons whatsoever, at the suit of, or by the prosecution of any person or persons whatsoever, shall be void and of none effect, unless such process shall be so granted or awarded, upon motion first made before the judge or judges of the same courts respectively, (sitting in open court, and upon declaration in writing upon their corporal oaths, to be then exhibited unto them, by the parties which shall desire such process) of the causes for which such process shall be granted or awarded, by or out of the said courts respectively, and unless that such motion and declaration be mentioned

" to be made upon the back of a writ; the said writings there
 " to be entered and remain of record; and that if it shall
 " afterwards appear unto the said courts, or either of them
 " respectively, that the causes expressed in such writings, or
 " any of them, be untrue, That then the judge or judges of
 " the said courts, or either of them respectively, shall and
 " may award such costs and damages unto the parties grieved,
 " for their, or any of their wrongful vexations in that behalf,
 " as they shall think fit; and that the party or parties so of-
 " fending, shall and may be committed to prison by such
 " judge or judges, until he or they pay the said costs and
 " damages. (4)

(4) A peer or peers cannot be bound over in any other place than the courts of king's bench or exchequer. 4 Comm. 251. A peeress may demand it against her lord, as in the cases of the Marquis of Carmarthen. Foster 359. Lord Vane, Str. 1202. Earl of Stamford. Hardw. cases 74. Earl Ferrers. Burr. 631, 703. Lady Strathmore, East. 25 Geo. 3. Lord Howard, 11 Mod. 109. Also 3 Burr. 1922. The articles must be verified by the oath of the exhibitor; an affirmation therefore is not sufficient. Str. 527. 12 Mod. 243. Nor will the court permit the truth of the allegations to be controverted by the defendant, but will order security to be taken immediately, if no objections arise upon the face of the articles themselves. Str. 1202. But if on an application for the assistance of the court to enforce the subsequent process, the articles should manifestly appear, from the corroborated affidavit of the defendant, to have been a malicious, voluntary, and gross perjury, the court will resist the application, and commit the offender. 2 Burr. 806. 3 Burr. 1922. Nor will the court receive articles of the peace, if the parties live at a distance in the country, unless they have previously made application to a justice in the neighbourhood. 2 Burr. 780. And if the court do receive them, the secondary may indorse the attachment, in the sum required, and order a justice of the country to take the security. 2 Burr. 1039. 1 Black. 233. Or, if very particular circumstances attend the case, the court will compel the justices by mandamus. Strange 835: But that this is a singular instance, vide Sayer 253.

Sec. 9. As to the sixth point, viz. In what manner such surety is grantable by a justice of peace, it seemeth certain, That if the person to be bound be in the presence of the justice, he may be immediately committed, unless he offer sureties; and from hence it follows, a fortiori, that he may be commanded by word of mouth to find sureties, and committed for his disobedience; but it is said, that if he be absent, he cannot be committed without a warrant from some justice of peace, in order to find sureties, and that such warrant ought to be under seal, and to shew the cause for which it is granted, and at whose suit, and that it may be directed to any indifferent person. (5)

(5) A justice cannot enjoin another to keep the peace under a penalty. 3 Com. Dig. 370. Nor commit for not finding security, until the party has been required, and has refused so to do. Per Pratt. King v. Wilks, E. 3 Geo. 3.

Sec. 10. As to the seventh point, viz. In what manner the process for the peace ought to be executed. It seems needless to give a particular account of the execution of the writ of *supplicavit*, because I do not find that it is much in use at this day, and therefore I shall refer the reader for this purpose to Fitzherbert's *Natura Brevium*, fol. 80, &c. But as to the execution of a warrant of a justice, the following rules are to be observed. (6)

(6) If there be no proceedings on a *supplicavit* within a year, the recognizance is, of course, discharged; and if the party be committed after the expiration of that time, he shall be discharged upon

14 H. 7, 2, 9,
 10.
 9 Ed. 4, 3.
 B. Mainpr. 39.
 Lamb. 85, &c.
 Dalt. c. 69.
 2 Will. 158.

Reg. 83.
 1 Keb. 203, 290.
 6 Mod. 47.
 2 Peere W. H.
 202.
 Skinner 61.
 2 Keb. 305.
 1 Sid. 67.
 1 Lev. 53.

very slight security. Fitzg. 268. If taken below, and the party appear pursuant to the condition, no indictment being lodged, he must be discharged. Hard. Ca. But the court in discretion may refuse to discharge a recognizance, even though the exhibitant appear and consent; for a breach against any other person is equally a forfeiture. 31 Mod. 209.

amb. 89.

Sec. 11. First, It can be executed only by the persons to whom it is directed, or some of them, unless it be directed to the sheriff, who may either by parole, or by precept in writing, authorize an officer sworn and known, to serve it, but cannot empower any other person without a precept in writing.

L. Quinto.
5 Ed. 4. 12, 13.
B. false imp. 18.
Dalt. c. 69.
Lamb. 90, 91.
Crom. 235.
5 Co. 59.
6 Co. 54.
5 Co. 59.

Sec. 12. Secondly, If the warrant be made in the common form, directing the officer to cause the party complained of to come before some justice of the peace to find sufficient surety, &c. and if he shall refuse so to do, to convey him immediately to prison, without expecting any further warrant, until he shall willingly do the same, &c. the officer who serves it, before he makes any arrest, ought first to require the party to go with him, and find sureties according to the purport of the warrant, but upon his refusal to do either, he may carry him to the gaol by force of the same warrant without more.

Dalt. c. 69.
Brook false imprisonment 11.
21 H. 7. 21.
Lamb. 94, 95.

Sec. 13. Thirdly, If the warrant specially direct, that the party shall be brought before the justice who made it, the officer ought not to carry him before any other. But if the warrant be general, to bring him before any justice of peace, &c. the officer has the election to bring him before what justice he pleases, and may carry him to prison for refusing to find surety before such justice.

Dalt. c. 69.

Sec. 14. As to the eighth point, *viz.* How such process may be superseded. It is said, That if one who fears that the surety of the peace will be demanded against him, find sureties before any justice of the peace of the same county, either before or after a warrant is issued against him, he may have a *superfedeas*, from such justice, which shall discharge him from arrest from any other justice, at the suit of the same party, for whose security he has given such surety. Also it is said, That an appearance upon a recognizance for the peace may be superseded, by finding sureties in the chancery or king's bench, and purchasing a writ testifying the same. But this practice having often been abused by turbulent persons, who deservedly fearing to be bound to the peace or good behaviour, by justices of peace, would procure themselves to be bound thereto in the said courts, upon insufficient sureties, or upon the colourable prosecution of some person who would be ready at all times to release them at their pleasure; whereupon writs of *superfedeas* had been often directed to justices of peace, commanding them to forbear to arrest the parties for such causes; by reason whereof such turbulent persons used to misdemean themselves among their neighbours with impunity, as it is recited by 21 Jac. 1. c. 8. It is thereupon enacted by

Lamb. 112, 113.
Sec 2 R. Abr.
432.

the said statute, "That all writs of superſedeas, to be granted
out of either of the ſaid courts, ſhall be void, unleſs ſuch
proceſs be granted upon motion in open court firſt made,
&c. upon ſuch ſufficient ſureties, as ſhall appear unto the
judge or judges of the ſame court reſpectively, upon oath;
to be aſſeſſed at five pounds lands, or ten pounds in goods,
in the ſubſidy book, at the leaſt; which oaths, and the
names of ſuch ſureties, with the places of their abode, and
where they ſtand ſo aſſeſſed in the ſubſidy books, ſhall be
entered, and remain of record in the ſame courts: And
unleſs it ſhall alſo firſt appear unto the ſaid judge or judges,
from whom ſuch ſuperſedeas is deſired, That the proceſs of
the peace, of good behaviour, is proſecuted againſt him or
them, deſiring ſuch ſuperſedeas *bona fide*, by ſome party
grieved, in that court, out of which ſuch ſuperſedeas is deſ-
ired to be ſo awarded and directed."

2 Chanc. Rep.
68.

Vide ante, p. 24
2 Burr: 806.

Sec. 15. As to the ninth point, viz. What ought to be
the form of ſuch a recognizance. If it be taken in purſuance
of a writ of *ſupplicavit*, it muſt be wholly governed by the di-
rections of ſuch writ; but if it be taken before a juſtice of
peace, upon a complaint below, it ſeems that it may be regu-
lated by the diſcretion of ſuch juſtice, both as to the number,
and ſufficiency of the ſureties, and the largeneſs of the ſum,
and the continuance of the time, for which the party ſhall be
bound. And it hath been ſaid, That a recognizance to keep
the peace as to *A. B.* for a year, or for life, or without ex-
preſſing any certain time, (in which caſe it ſhall be intended
to be for life) or without fixing any time or place for the
party's appearance, or without binding him to keep the peace
againſt all the king's people in general, is good.

Lamb. 105, 106;
Dalt. c. 70.

Sec. 16. However; it ſeems to be the ſafeſt way to bind
the party to appear at the next ſeſſions of the peace, and in
the mean time to keep the peace as to the king, and all his
liege people, eſpecially as to the party, according to the com-
mon form of precedents.

3 Com. Dig. 374
Lamb. 105.
Dalt. c. 124.

Sec. 17. As to the tenth point, viz. How ſuch a recog-
nizance may be diſcharged. It ſeems agreed, That it may
be diſcharged by the demise of the (a) king in whoſe reign it
was taken; or of the (b) principal party who was bound
thereby; if it were not forfeited before. Alſo it hath been
holden, That it may be diſcharged by the (c) releaſe of the
party at whoſe complaint it was taken; being certified together
with it. But this may juſtly be queſtioned, becauſe the re-
cognizance is not to the ſubject, but to the king, and conſe-
quently cannot be diſcharged by the ſubject, who is not a party
to it. However, ſuch a releaſe will be a good inducement to
the court, to which ſuch a recognizance ſhall be certified, to diſ-
charge it; and ſo alſo will the non-appearance of the party at
the ſeſſions.

(a) B. Peacé
15. 17.
1 H. 7. 21. 10.
(b) 15 H. 7. 21.
13.
21 Ed. 4. 70.
Dalt. c. 71.
1 Lev. 235.
(c) Lamb. 117;
60.
Grom. 139; 169;
144.
11 H. 7. 12.
11 H. 4. 43.
B. n. c. 36.
6 B. c. 37.
f. 34.
2 Ven. 136.

Savil 53.
1 Lev. 235.
C. Jac. 282.
Yely. 207.
12 Mod. 251.
Str. 835.
2 P. Will. 201.
1 Burr. 703.
3 Buri. 1922.

whose complaint it was taken, in order to pray the continuance of it; and yet it is said, that the sessions in that case may, in their discretion, refuse to discharge it. However; it is certain that such a recognizance cannot be pardoned, or released by the king, before it is broken, because the subject has a kind of interest in it. And it is said, That the sureties are not discharged by their death, but that their executors, &c. continue bound as their testators, &c. were:

Lamb. 111, 112, &c.
Dalt. c. 70.
Hil. 1 Geo. 1.
K. v. Combs agreed.

Sett. 18. As to the eleventh point, viz. How such a recognizance ought to be certified, and proceeded upon. If it be taken by force of a writ of *supplicavit*, it needs not be certified till the justice receive a writ of *certiorari* to that purpose; but if it be taken upon a complaint below, it must be certified, sent, or brought to the next sessions of the peace by force of 3 Hen. 7. c. 1. that the party so bound may be called; and by the same statute, "If the party then make default, the same default shall be then recorded, and the same recognizance with the record of the default, shall be certified into the chancery, king's bench, or exchequer." However, if the party have any excuse for his not appearing, it seems that the sessions is not bound peremptorily to record his default, but may equitably consider of the reasonableness of such excuse. And it is said, That the sessions cannot in any case proceed against the party for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace; but that the recognizance in such case ought to be removed into some of the king's courts of Westminster-hall, who shall proceed by *scire facias*, upon such recognizance, and not by indictment, &c.

Sayer 253.
Dalt. c. 71.
Raym. 169, 196.
C. Jac. 508.
1 R. A. 900.
Parker 54.

1 Bullst. 120.
Whether such
scire facias must
shew the day on
which the ses-
sions was holden,

Sett. 19. It seemeth that in a *scire facias* upon such a recognizance, it is sufficient to lay the fact alledged for the breach thereof, as having been done *contra pacem*, without using the words *vi & armis*.

till which the party was bound to keep the peace. C. Car. 138.

B. Peace 20.
Dalt. c. 72.
Lamb. 127, 128.
Sayer 139.

Sett. 20. As to the twelfth point, viz. How such recognizance may be forfeited. There is no doubt but that it may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others thro' his procurement, as manslaughter, rape, robbery, unlawful imprisonment, &c.

Lamb. 115, &c.
Dalt. c. 72.
2 H. 7. 2. seems
otherwise.
18 Ed. 4. 28.
22 Ed. 4. 35.
C. Car. 498.
109. See the
books cited in the following session, and 2 R. Abr. 545. Pl. 2, 3, 4, 5, 6, 7.

Sett. 21. Also it has been holden, That it may be forfeited by any treason against the person of the king, and also by any unlawful assembly *in terrorem populi*, and even by words directly tending to a breach of the peace, as by challenging one to fight, or in his presence, threatening to beat him, &c.

books cited in the following session, and 2 R. Abr. 545. Pl. 2, 3, 4, 5, 6, 7.

Sec. 22. However, it seems that it shall not be forfeited by bare words of heat and choler, as the calling a man knave, teller of lies, rascal, or drunkard; for though such words may provoke a cholerick man to break the peace, yet they do not directly challenge him to it, nor does it appear that the speaker designed to carry his resentment any farther. And it has been said, That even a recognizance for the good behaviour, shall not be forfeited for such words; from whence it follows *a fortiori*, That a recognizance for the peace shall not.

Sayer 140.

C. Eliz. 86.
Moor 249.
2 Roll. 199, 227.
Palmer 126.
Infra p. 284.

Sec. 23. Also there are some actual assaults on the person of another, which do not amount to a forfeiture of such a recognizance; as if an (a) officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or if a (b) parent in a reasonable manner chastise his child, or a master his servant, (c) being actually in his service at the time; or a (d) schoolmaster his scholar, or a (e) gaoler his prisoner, or even a (f) husband his wife, as some say; or if (g) one confine a friend who is mad, and bind, and beat him, &c. in such a manner as is proper in such circumstances; or if a man (h) force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; or if (i) I beat one (without (k) wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my land, or goods; or the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him, and disturbing him; or if a man beat, (l) or, as some say, wound, or maim one who makes an assault upon his person, or that of his (m) wife, parent, child, or master; especially if it appear that he did all he could to avoid fighting before he gave the wound; or if a (n) man fight with or beat one who attempts to kill any stranger; or if a man even (o) threaten to kill one who puts him in fear of death in such a place where he cannot safely fly from him; or if one (p) imprison those whom he sees fighting, till the heat is over.

(a) 2 Ed. 4. 6.
21 H. 7. 39.
(b) Dalt. c. 72.
Crom. 136.
(c) 38 H. 6. 25.
1 Sid. 176.
(d) Sum. 32.
1 Sid. 177.
21 Ed. 4. 6.
(e) Dalt. c. 72.
(f) Crom. 28.
136.
F. N. B. 80.
Herley 149.
Con. 1 Sid. 113.
116.
(g) 12 Aff. 56.
2 R. A. 546.
22 Ed. 4. 5.
(h) C. Jac. 134.
2 R. A. 546.
(i) 3 H. 4. 6.
Lutw. 148.
C. Jac. 236.
C. Car. 138.
19 H. 6. 31.
10 E. 4. 6.
21 Ed. 4. 28.
Keilw. 92.
Yelv. 172.
2 R. A. 547.
548, 549.
Pult. 5. 6.
Crom. 137.
Dalt. c. 72.
Inf. c. 64. f. 1.

(k) 2 R. Abr. 548. (l) 41 Aff. 21. 27 Ed. 3. 94. 25 Ed. 3. 42. 8 H. 4. 8. 9 Ed. 4. 48.
12 Ed. 4. 6. R. Tort Dem. 57. 1 Sid. 246. Kely. 128. 2 R. Abr. 547. 1 Keb. 384, 921.
2 Inst. 316. (m) 31 H. 6. 40, 51. 19 H. 6. 31, 66. 22 Ed. 4. 6. Crom. 136. Dalt. c. 72.
2 R. Abr. 546. (n) 12 H. 8. 2. (o) 38 H. 6. 18. 20 Ed. 4. 6. (p) 2 R. Abr. 559.
22 E. 4. 45.

Sec. 24. According to some opinions, a (q) master shall not forfeit such a recognizance for beating another in defence of his servant. But it is said, That a (r) servant is liable to such forfeiture for beating another in defence of his master's

(q) 2 R. Ab.
546.
19 H. 6. 31, 66.
Dalt. c. 72.
Crom. 136.
Con. 9 Ed. 4.

48. Balk. 402. (r) 9 Ed. 4. 48. B. Tref. 139.

(#) Dalt. c. 72.
Lamb. 129.

son, though he were commanded by the master so to do, because he is not a servant to the son; and for the like reason it is said, That a (a) tenant shall incur the like forfeiture for beating another in defence of his landlord, &c.

Crom. 136.
Dalt. c. 72.
C. Eliz. 86.
Moot. 249.

Sett. 25. But it seems agreed, That no one shall forfeit such a recognizance by a bare trespass on another's lands, or goods, unless it be accompanied with some violence to the person.

Dalt. c. 22.
R. Co. 229.
F. Bar. 244.

Sett. 26. And it seems to be the better opinion, That a man is in no danger of such a forfeiture from any hurt done to another, by playing at cudgels, or such like sport, by consent, because the intent of the parties seems no way unlawful, but rather commendable, and tending mutually to promote activity and courage. Yet it is said, That he who wounds another in fighting with naked swords, does in strictness forfeit such a recognizance, because no consent can make so dangerous a diversion lawful.

Hobart 134.
2 R. Abr. 548.

Sett. 27. But it seemeth, That a man shall not forfeit such recognizance, by a hurt done to another merely through negligence, or mischance; as where one soldier hurts another by discharging a gun in exercise, without sufficient caution; for notwithstanding such person must, in a civil action, give the other satisfaction for the damage occasioned by his want of care, yet he seems not to have offended against the purport of such a recognizance, unless he be guilty of some wilful breach of the peace.

CHAPTER THE SIXTY-FIRST.

OF SURETY FOR THE GOOD BEHAVIOUR.

4 Comm. 248,
251, 253.

AND now we are come to surety for the good behaviour, which being of great affinity with surety of the peace, both as to the manner in which it is to be taken, superseded, and discharged, &c. seems not to require a particular consideration, save only as to the following points, First, For what misbehaviours it is to be required.—Secondly, For what it shall be forfeited.

Sett. 1. As to the first point, it is to be observed, That by 34 Edw. 3. c. 1. "Justices of peace are empowered
"to restrain offenders, rioters, and all other barrators, and
"to pursue, arrest, take, and chastise them, according to
"their trespasss, or offence; and to cause them to be
"imprisoned, and duly punished according to the laws and
"customs

" customs of the realm, and according to that which to them
 " shall seem best to do by their discretions, and good advise-
 " ment, and also to inform them, and to enquire of all those
 " who have been pillors and robbers in the parts beyond
 " the sea, and be now come again, and go wandring, and
 " will not labour as they were wont in times past, and to take
 " and arrest all those that they may find by indictment or by
 " suspicion, and to put them in prison, and to take of all them
 " that be not of good fame, where they shall be found,
 " sufficient surety and mainprize of their good behaviour
 " towards the king, and his people, and the other duly to pu-
 " nish, to the intent that the people be not by such rioters
 " troubled nor indamaged, nor the peace blemished, nor mer-
 " chants, nor others passing by the highways of the realm dis-
 " turbed, nor put in the peril which may happen of such of-
 " fenders,"

See, 2. In the construction hereof there seem to have been
 some opinions, that the statute, speaking of those that be not of
 good fame, means only such as are defamed, and justly sus-
 pected that they intend to break the peace, and that it does
 not any way extend to those who are guilty of other misbeha-
 viours not relating to the peace. But this seems much too
 narrow a construction, since the abovementioned expression of
 persons of evil fame, in common understanding, as properly
 includes persons of scandalous behaviour in other respects, as
 those who by their quarrelsome behaviour give just suspicion of
 their readiness to break the peace. And, accordingly, it seems
 to have been always the better opinion, That a man may be
 bound to his good behaviour for many causes of scandal which
 give him a bad fame, as being contrary to good manners only ;
 as for (a) haunting bawdy-houses with women of bad fame ;
 or for (b) keeping bad women in his own house ; or for speak-
 ing words of contempt of an inferior (c) magistrate, as a jus-
 tice of peace, or mayor of a town, &c. though he be not
 then in the actual execution of his office, or of an inferior
 officer of justice, as a constable, and such like, being in the
 actual execution of his office,

Vide *2a. lous* 24.

4 Inst. 281,
 2 H. 7. 2. 3.
 13 H. 7. 10.
 Pulton 18.

4 Burn 270.
 Lamb. 115, 116.
 117.
 Hale c. 75.

12 Mod. 566.
 (a) 13 H. 7. 1.
 (b) Crom. 140.
 (c) C. Eliz. 8.
 1 Levin. 52,
 53, 107.
 11 Co. 98.
 1 Roll. 224.
 Latch 220.
 Con. C. Eliz.
 689, 444.
 Palmer 130.

1 Roll, 227, 228. 3 Bulst. 139, 140. Cro. Car. 409.

See, 3. However, it seems the better opinion, That
 no one ought to be bound (d) to the good behaviour for any
 rash, quarrelsome, or unmannerly words, unless they either
 directly tend to a breach of the peace, or to scandalize the go-
 vernment, by abusing those who are intrusted by it with the
 administration of justice, or to deter an officer from doing his
 duty; and therefore it seems, That he (e) who barely calls
 another rogue, or rascal, or teller of lies, drunkard, &c.
 ought not for such cause to be bound to the good behaviour.

(d) C. Car. 492,
 499.
 (e) C. Eliz. 86.
 Moor 249.
 Sup. c. 60 f 22.
 2 Roll. 205,
 227.
 Palmer 126.

Dalt. 75.
2 Roll. 150.
2 Vent. 22, 23,
24.

Sec. 4. However, I cannot find any certain precise rules for the direction of the magistrate in this respect, and therefore am inclined to think, that he has a discretionary power to take such surety of all those whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous, as of those who sleep in the day, and go abroad in the night, and of such as keep suspicious company, and of such as are generally suspected to be robbers, &c. and of eve-droppers, and common drunkards, and all other persons, whose misbehaviour may reasonably be intended to bring them within the meaning of the statute, as persons of evil fame, who, being described by an expression of so great latitude, seem in a great measure to be left to the judgment of the magistrate. But if he commit one for want of sureties, he must shew the cause, &c. with convenient certainty. (1)

(1) Security for good behaviour may be taken. For using opprobrious words in a court of justice, 1 Lev. 107. Accusing justices of ignorance in the Excise laws. 1 Vent. 16. Publishing an obscene book. Post. 143. For exciting discontents in the minds of the people. 2 Vent. 24. For offering medicines to destroy a child in the womb. Cro. Eliz. 449. For obstructing another on his necessary way to a court of justice, 2 Lill. R. 649. For disturbing a licensed preacher. 1 Mar. 1. 2. 3. For unlawful fishing or hunting, 5 Eliz. c. 21. For neglecting church a month. 23 Eliz. c. 1. For hunting or stealing deer or conies. 1 Jac. 1. c. 13. sed vide 16 Geo. 3. c. 20. And it is a usual part of the judgment in a misdemeanour. 4 Bac. Ab. 698. By a justice of the peace cannot compel the security upon a general information. Str. 16. And whether a person taken upon the warrant of a secretary of state for a libel, shall give security for his good behaviour, seems unsettled, 2 Will. 29. sed vide 2 Will. 160. And for a very full account of this title, 4 Burn 269, 283.

Palmer, 129, 130.
C. Cas. 499.

Sec. 5. As to the second point, viz. For what misbehaviours such a recognizance shall be forfeited, it is laid down as a general rule in the argument of *Stamp and Hide's case*, That whatever will be a good cause to bind a man to his good behaviour, will forfeit a recognizance for it. Yet this is since denied in *Heyward's case*; and indeed does by no means seem to be maintainable, because the statute in ordering persons of evil fame to be bound in this manner, seems in many cases chiefly to regard the prevention of that mischief which they may justly be suspected to be likely to do; and in that respect requires them to secure the publick from that danger which may probably be apprehended from their future behaviour, whether any actual crime can be proved upon them, or not; and it would be extremely hard in such cases to make persons forfeit their recognizance, who yet may justly be compellable to give one, as those who keep suspicious company, or those who spend much money idly, without having any visible means of getting it honestly, or those who lie under a general suspicion of being rogues, &c.

23 H. 7. 10.
Dalt. c. 75.
2 H. 7. 2.
C. Eliz. 86.
Moore 249.
2 Roll 228, 250;
199.
C. Cas. 499.

Sec. 6. However, it seems that such a recognizance shall not only be forfeited for such actual breaches of the peace, for which a recognizance for the peace may be forfeited, but also for some others, for which such a recognizance cannot be forfeited, as for going armed with great numbers to the ter-

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ror of the people, or speaking words tending to sedition, &c. and also for all such actual misbehaviours which are intended to be prevented by such a recognizance, but not for barely giving cause of suspicion of what perhaps may never actually happen.

2 Leo. 160.
Godb. 622. 22.
Lamb. 116, 118.
C. Jac. 412.

It may be discharged on motion on producing prosecutor's consent, verified by affidavit. Hardwick's case, 158. Or consenting by counsel. 1 Burr. 703. See vide ch. 60. § 17.

CHAPTER THE SIXTY-SECOND.

OF ASSAULTS AND BATTERIES.

AND now I am come to consider the several kinds of actual disturbances of the peace, and these are; either, such as may be committed by one or two persons; or, such as require a great number.

Those which may be committed by one or two persons, are, Assaults and batteries; or, Assays; or, forcible entries and detainers.

As to assaults and batteries, I shall consider the following particulars; First, What shall be said to be an assault. Secondly, What shall be said to be a battery. Thirdly, In what cases they may be justified. Fourthly, In what manner they are to be punished.

SECT. 1. As to the first point. It seems that an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another; as by striking at him with, or without, a weapon; or presenting a gun at him, at such a distance to which the gun will carry, or pointing a pitch-fork at him, standing within the reach of it; or by holding up one's fist at him, or by any other such like act done in an angry threatening manner; and from hence it clearly follows, That one charged with an assault and battery, may be found guilty of the former, and yet acquitted of the latter. But every battery includes an assault, therefore on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault.

Pulton 4.
6 Mod. 173, 174.
2 R. Abr. 545.
1 Vent. 256.
1 Mod. 3.
1 Keb. 921.
41 Ed. 3. 40.
42 Ed. 3. 7.
45 Ed. 3. 24, 25.
22 Aff. 60.
2 R. Abr. 545.
20 Mod. 187.
2 Keb. 545.
Law of Evid.
235.

SECT. 2. As to the second point, viz. What shall be said to be a battery. It seems that any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as, by spitting in his face, or any way touching him in anger, or violent-

22 A.T. 11.
Pult. 3.
Lamb. 126.
Salk. 384.
6 Mod. 149.
173.
1 Mod. 3.

3 Lev. 404.
Skins. 387.
2 R. Abr. 546.

ly jostling him out of the way, are batteries in the eye of the law. But it is said to be no battery to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants,

6 Mod. 172,
230, 263.
4 Comm. 145.
216.
11 Mod. 43, 52.
2 Salk. 642.
L. Ray. 177.
1 Sid. 246.
Holt. 699.

SecT. 3. As to the third point, viz. In what cases an assault and battery may be justified. This is so fully set forth already in the chapter of *Surety of the Peace*, that there seems to be no need of any farther consideration thereof in this place; and therefore I shall only add, That where a man in his own defence beats another who first assaults him, &c. he may take an advantage thereof upon an indictment, as well as upon an action; but with this difference, that in the first case he may give it in evidence upon the plea of Not guilty, and in the latter he must plead it specially.

8 Mod. 281.
1 Bac. Ab. 158.

SecT. 4. As to the fourth point, viz. How unlawful assaults and batteries are punished, there is no doubt but that the wrong-doer is subject, both to an action at the suit of the party, wherein he shall render damages, &c. and also to an indictment, at the suit of the king, wherein he shall be fined according to the heinousness of the offence,

Form of indictment, Cro. Cir. 121.

† *SecT. 5.* By 5 Hen. 4. c. 6. and 11 Hen. 6. c. 11. “To assault or affray any of the members of the house of lords, or house of commons, or other council of the king, or any of their servants, in their way to, or attendance on parliament, is punishable, upon non-surrender, on proclamation, with double damages, and fine and ransom at discretion.”

4 Comm. 218.
6 Mod. 172.
2 Inst. 492, 620.

† *SecT. 6.* By 9 Edw. 1. c. 3. “If any lay violent hands on a clerk, he may be indicted before the king for the peace broken; and sued before the bishop for the spiritual offence.”

† *SecT. 7.* By 5 Eliz. c. 4. s. 21. “If any servant assault or affray his master, mistress, or overseer, he shall suffer imprisonment, not exceeding a year, on conviction before two justices of the county. or the chief magistrate and two corporators of a town.—And if further punishment should appear necessary, the justices in sessions, or the head magistrate and four or six corporators in a town, may exercise their discretion, so that the punishment extend not to life or limb.”

† *SecT. 8.* By 9 Ann. c. 16. “To assault and strike any privy counsellor, in the council, or in any committee thereof, in the execution of his duty, is death.”

† *SecT. 9.* By 9 Ann. c. 14. s. 8. “To assault and beat any other on account of money won by gaming, in the man-
“ner

"ner described, is forfeiture of goods, and two years imprisonment."

† *Stat.* 10. By 6 Geo. 1. c. 23. s. 11. "To assault another in the street, with intent to spoil their cloaths, is transportation." Vide O.B. 1781, No. 261. Cro. Cir. 122.

† *Stat.* 11. By 9 Geo. 1. c. 22. "To assault another by wilfully shooting at him, is felony without clergy." Ante. p. 225

† *Stat.* 12. By 7 Geo. 2. c. 21. "To assault with intent to rob is transportation." Ante. p. 142.

† *Stat.* 13. By 12 Geo. 1. c. 24. "To assault any master woolcomber, or weaver, or other person concerned in the woollen manufactory, whereby he shall receive any bodily hurt, for not complying with any of the bye laws which are mentioned in the act, or shall write or send any threatening letter, &c. &c. is transportation for seven years," Ante. p. 239.

CHAPTER THE SIXTY-THIRD.

OF AFFRAYS.

IN treating of Affrays, I shall consider,—First, What shall be said to be an affray. Secondly, How far it may be suppressed by a private person. Thirdly, How far by a constable. Fourthly, How far by a justice of peace. Fifthly, In what manner the several kinds of affrays may be punished. 4 Comm. 145.

Stat. 1. As to the first point, It is said, That the word affray is derived from the *French* word *Effraier*, to terrify, and that in a legal sense it is taken for a publick offence, to the terror of the people. From this definition it seems clearly to follow, That there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people; and for this cause such a private assault seems not to be inquirable in a court of law, as all affrays certainly are, as being common nuisances. 3 Inst. 158. Dalt. c. 2. Lamb. 125, 126. 4 H. 6. 10. 8 Ed. 4. 5. Summary 135.

Stat. 2. Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, That the constable may, at the request of the party threatened, 23 Ed. 4. 45. Dalt. c. 8. Lamb. Constable, 14.

ened, carry the person, who threatens to beat him, before a justice, in order to find sureties,

Popham 158.
1 Inst. 158.
1 Sid. 186.
1 Keb. 694.
Hob. 120, 215.
2 R. Abr. 78.
2 Burr. 316
Carr & Hanky.

Sec. 3. Also it is certain, That it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c.

† By 9. Ann. c. 14. s. 8. "Whoever shall challenge or provoke to fight any other person or persons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games mentioned in the act, shall, on conviction by indictment, or information, forfeit all their goods, chattels, and personal estate, and suffer imprisonment without bail, in the county prison for two years."

Lamb. 126.
3 Inst. 160, 76.
2 R. Abr. 78.
Summary 137.

Sec. 4. But granting that no bare words, in the judgment of law, carry in them so much terror as to amount to an affray; yet it seems certain, That in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by many statutes,

For by 2 Edw. 3, it is enacted, "That no man, great nor small, of what condition soever he be, except the king's servants, in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, and the same in such places where such acts happen, be so hardy to come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring no force in affray of peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the king, and their bodies to prison, at the king's pleasure. And that the king's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises, and their bailiffs in the same, and mayors and bailiffs of cities and boroughs, within the same cities and boroughs, and borough-holders, constables and wardens of the peace within their wards, shall have power to execute this act: And that the justices assigned, at their coming down into the country, shall have power to enquire how such officers and lords have exercised their offices in this case, and to punish them whom they find, that have not done that which pertained to their office," and this statute is further enforced by 7 Rich. 2. c. 13. and 20 Rich. 2. c. 1.

Sett. 5. And in the exposition of it the following points have been holden : First, That any justice of peace, or other person, who is empowered to execute this statute, may proceed thereon, either *ex officio*, or by force of a writ out of chancery, formed upon the statute, and that if he find any person in arms contrary to the form of the statute, he may seize the arms, and commit the offender to prison ; and that he ought also to make a record of his whole proceeding, and certify the same into the chancery, where he proceeds by force of the said writ, or into the exchequer, where he proceeds *ex officio*.

F. N. B. 249.

3 Inst. 161.
Dalt. c. 22.
Lamb. 168. 26.
Dalt. 23.
2 Bull. 336.

Sett. 6. Secondly, That where a justice of peace, &c. proceeds upon the said writ, he may not only imprison those whom he shall find offending against the statute in his own view, but also those who shall be found by an inquest taken before him, to have offended in such manner in his absence. And I do not see why he may not do the same where he proceeds *ex officio* ; for seeing the said writ hath no other foundation but the said statute, and is the most authentick explication thereof, it seemeth that the rules therein prescribed, should be the best direction for all proceedings upon that statute.

C. Eliz. 294.
Con. Lamb. 170.

Sett. 7. Thirdly, That the under-sheriff may execute the said writ, being directed to the sheriff, if it name him only by the name of his office, and not by his proper name, and do not expressly command him to act in his proper person.

C. Eliz. 294.

Sett. 8. Fourthly, That a man cannot excuse the wearing such armour in publick, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault ; but it hath been resolved, That no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle.

24 Ed. 3. 33.
21 H. 7. 39.
3 Inst. 161.
Con. 2 Roll. 78.
2 H. 7. 39.

Sett. 9. Fifthly, That no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people ; from whence it seems clearly to follow, That persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. And from the same ground it also follows, That persons armed with privy coats of mail, to the intent to defend themselves, against their adversaries, are not within the meaning of this statute, because they do nothing *in terrorem populi*.

3 Mod. 217.
2 Bull. 330.

Crom. 64.

Sett. 10. Sixthly, That no person is within the intention of the said statute, who arms himself to suppress dangerous rioters,

Fol. 221, 222.

rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace or quiet of the realm; for persons who so arm themselves, seem to be exempted out of the general words of the said statute, by that part of the exception in the beginning thereof, which seems to allow all persons to arm themselves upon a cry made for arms to keep the peace, in such places where such acts happen.

Lamb. 131.
3 Inst. 158.
Summary 131.
3 Inst. 52.
22 E. 4. 44.
Dalt. c. 8.
Lamb. 131.
Infra c. 17.

SecT. 11. As to the second point, *viz.* How far an affray may be suppressed by a private person, it seems agreed, That any one who sees others fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of peace, in order to their finding sureties for the peace: Also it is said, That any private person may stop those whom he shall see coming to join either party; and from hence it seems clearly to follow, That if a man receive a hurt from either party in thus endeavouring to preserve the peace, he shall have his remedy by an action against him; also upon the same ground it seems equally reasonable, That if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well justify it, inasmuch as he is no way in fault; and the damage done to the other, was occasioned by a laudable intention to do him a kindness.

3 Inst. 138.
Con. Lamb. 131.
Dalt. c. 8.

Lamb. 131.
Dalt. c. 8.
3 Inst. 158.
B. F. Imp. 35.
44.
Summary 135.
10 H. 7. 20.
3 Inst. 52.

SecT. 12. However it seems clear, That if either party be dangerously wounded in such an affray, and a stander by, endeavouring to arrest the other, be not able to take him without hurting, or even wounding him, yet he is no way liable to be punished for the same, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace, by whom he either is to be bailed or committed, &c.

3 Inst. 158.
Summary 135.
Lamb. 132, 133.
Dalt. c. 8.
3 H. 7. 10.

SecT. 13. As to the third point, *viz.* How far an affray may be suppressed by a constable. It seems agreed, That a constable is not only impowered, as all private persons are, to part an affray which happens in his presence, but is also bound at his peril to use his best endeavours to this purpose, and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment,

Lamb. 132, 133.
Dalt. c. 1, 8.
Summary 136.
Dalt. c. 1, 8.
B. Surety, 23.
36.
C. Eliz. 375.
9 Ed. 4. 26.

SecT. 14. And it is said, That if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, &c. or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c. or

be

he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation. But it seems, That he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence, And it is said, That he ought not to lay hands on those, who barely contend with hot words; without any threats of personal hurt, and that all which he can do in such a case, is to command them under pain of imprisonment to avoid fighting.

Moor 284.
3 H. 4. 9.
22 E. 4. 34.
10 Ed. 4. 18.
5 H. 7. 6.
Sav. 97, 98.

Sec. 15. But he is so far intrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party.

5 H. 7. 6.
Summary 136.
1 Roll. 238.
2 Bulst. 329.

Sec. 16. And if an affray be in a house, the constable may break open the doors to preserve the peace, and if affrayers fly to a house and he follow with fresh suit, he may break open the doors to take them.

13 Ed. 4. 9.
7 Ed. 3. 12.
Dalt. c. 8, 67.
Lamb. 133, 134.

Sec. 17. But it is said, That a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice of peace, unless a felony were done or likely to be done; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; nor does it follow from his having power to compel those to find sureties who break the peace in his presence, that he has the same power over those who break it in his absence, inasmuch as in such case it is most proper to be done by those who may examine the whole circumstances of the matter upon oath, which a constable cannot do; yet it is said, That he may carry those before a justice of peace, who were arrested by such as were present at an affray, and delivered by them into his hands.

C. Elis. 373.
Owen 105.
Summary 92,
136.

Sec. 18. As to the fourth point, viz. In what manner an affray may be suppressed by a justice of peace; there is no doubt, but that he may and must do all such things to that purpose, which a private man or constable are either enabled, or required by the law to do. But it is said, That he cannot without a warrant authorize the arrest of any person for an affray out of his view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace.

Lamb. 137.
Dalt. c. 8.

Summary 136.
Dalt. c. 8.
B. F. Imp. 6,
12-33.
14 H. 8. 7.
Moor 468.

Sec. 19. Also it seems, That a justice of peace has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable; for
there

See 38 Ed. 3.
6, 7.

22 Aff. 56.
5 Mod. 84.

Summary 36.
Dalt. c. 8.
Popham 153.

there does not seem to be any good authority, that these have any power at all to take sureties of such an offender; but it seems certain, That a justice of the peace has a discretionary power either to commit him, or to bail him, till the year and day be past; but it is said, that he ought to be very cautious how he takes bail, if the wound be dangerous; for that if the party die, and the offender appear not, he is in danger of being severely fined, if he shall appear upon the whole circumstances of the case to have been too favourable.

Sec. 20. As to the fifth point, *viz.* In what manner the several kinds of affrays are to be punished; it sufficiently appears from the foregoing part of this chapter, how such affrays as are accompanied with force and arms, are to be dealt with upon the statute of Northampton; and therefore I shall only examine in this place, what penalties other affrays are liable unto.

Alegre 94.

As to which it is to be observed, That all affrays in general, are punished by fine and imprisonment, the measure of which is to be regulated by the discretion of the judges according to the circumstances of the case, which very much vary the nature of this crime, and in some cases make it so inconsiderable as scarce to deserve to be taken notice of; and in others make it an offence of a very heinous nature.

As in the following instances: First, In respect of the dangerous tendency thereof. Secondly, In respect of the persons against whom it is committed. Thirdly, In respect of the place wherein it happens.

Popham 153.
3 Inst. 158.

2 Rid. 136.
1 Keb. 694.

Moor 563.

Sec. 21. And, First, An affray may receive an aggravation from the dangerous tendency thereof, as where persons coolly and deliberately engage in a duel, which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, as putting men under a necessity of righting themselves; upon which considerations, persons convicted of barely sending a challenge, have been adjudged to pay a fine of one hundred pounds, and to be imprisoned for one month without bail, and also to make a publick acknowledgment of their offence, and to be bound to their good behaviour.

Sec. 22. Secondly, An affray may receive another aggravation from the persons against whom it is committed; as where the officers of justice are violently disturbed in the due execution of their office, as by the rescous of a person legally arrested, or the bare attempt to make such a rescous; for all the ministers of the law, are under its more immediate protection.

Sec. 23. Thirdly, An affray may receive a farther aggravation from the place wherein it is committed, and upon this respect

respect all affrays in the king's court are so severely punished, as hath been shewn already in chapter 21, and upon the same account also, all affrays in a church, or church-yard, have been always esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated. And upon this consideration, all irreverent behaviour in these places hath been esteemed so criminal by the makers of our laws, that they have not only severely punished such disturbances in them which are punishable wherever they happen, as all actual affrays, &c. but also such, which if they happen elsewhere, are not punishable at all; as bare quarrelsome words, and even such which would be commendable if done in another place; as arrests by virtue of legal process.

12 Co. 101.
1 Keb. 290, 291.
1 Mod. 186.

But, for the better understanding hereof, I shall consider the several statutes made for this purpose.

Stat. 24. And first, it is enacted by 5 & 6 Edw. 6. c. 4.
 " That if any person whatsoever, shall by words only quarrel, chide, or brawl, in any church or church-yard, that
 " then it shall be lawful unto the ordinary of the place where
 " the same offence shall be done, and proved by two lawful
 " witnesses, to suspend every person so offending; that is to
 " say, if he be a layman, *ab ingressu ecclesie*, and if he be a
 " clerk, from the ministration of his office, for so long time
 " as the same ordinary shall by his discretion think meet and
 " convenient, according to the fault."

Stat. 25. And it is further enacted by the said statute,
 " That if any person shall smite or lay any violent hands upon
 " any other, either in any church or church-yard; that then
 " *ipso facto*, every person so offending shall be deemed excom-
 " municate, and be excluded from the fellowship and com-
 " pany of Christ's congregation."

Stat. 26. And it is also further enacted by the said statute,
 " That if any person shall maliciously strike any person with
 " any weapon in any church or church-yard, or shall draw
 " any weapon in any church or church-yard, to the intent to
 " strike another with the same weapon; that then every per-
 " son so offending, and thereof being convicted by verdict of
 " twelve men, or by his own confession, or by two lawful
 " witnesses, before the justices of assize, justices of oyer and
 " terminer, or justices of peace in their sessions, by force of
 " this act, shall be adjudged by the same justices before whom
 " such person shall be convicted, to have one of his ears cut
 " off, &c. and besides that every such to be, and stand *ipso*
 " *facto* excommunicated, as aforesaid."

Stat.

Dyer 275.
C. Jac. 462.
1 Veh. 146.
Lit. 149.
Hest. 86.
C. Ellis. 979.
1 Burr. 240.
2 L.J. Ray. 850.
10 Mod. 63.
1779.
1 Ventris 146.
B. R. H. 179.
880, 224.
B. Prohib. 14.

Sec. 27. And in the exposition hereof it hath been holden :
First, That notwithstanding the words of the statute be expressed, That he who smites another in the church, &c. shall, *ipso facto*, be deemed excommunicate ; yet there ought either to be a precedent conviction at law, which must be transmitted to the ordinary, or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there ; for it is implied in every penal law, that no one shall incur the penalty thereof, till he be found guilty upon a lawful trial ; also it must be intended in the construction of this statute, that the excommunication ought to appear judicially ; for otherwise there could be no absolution. (1)

C. Jac. 367.
C. Car. 467.
Noy 171.

Sec. 28. Secondly, That he who strikes another in a church, &c. can no way excuse himself, by shewing that the other assaulted him.

1 Saund. 13.
14.
1 Sid. 301.
3 Keb. 124.
1 Mod. 168.

Sec. 29. Thirdly, That church-wardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute.

THIS act contains three distinct clauses levelled against three distinct offences in churches and church yards. First, Quarrelling, chiding, or brawling by words only. Secondly, Smiting or laying violent hands. Thirdly, Striking with a weapon ; or drawing one with intent to strike. The ecclesiastical court is not prohibited from proceeding upon the two first clauses ; but upon the third clause there must be a previous conviction transmitted to the ordinary, &c. If they proceed for damages on either clause, they shall be prohibited. The proceedings of the ecclesiastical court and the king's bench being *diverso intuitu*, the one to punish, and the other to amend : 1 Burr. 243. Vide 11 Mod. 200. Cathedral churches and church yards, which belong to them, are within this statute. 1 Leon. 248.

Sec. 30. Also it is enacted by 1 Mary, sess. 2. c. 3.
“ That if any person or persons, of their own power and authority, shall willingly and of purpose by open and overt
“ word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex or trouble, or by any other unlawful
“ ways and means, disquiet, or misuse, any preacher who shall be licensed, allowed, or authorized to preach by the
“ Queen's highness, or by any archbishop, or bishop of this realm, or by any other lawful ordinary, or by any of the
“ universities of *Oxford* and *Cambridge*, or otherwise lawfully authorized or charged, by reason of his or their cure, benefice, or other spiritual promotion or charge, in any of his,
“ or their open sermon, &c. or if any person or persons shall
“ maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any parson, vicar, parish-priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering or celebrating the mass, or
“ other such divine service, sacraments, or sacramentals, as was most commonly frequented and used in the last year of
“ the,

" the reign of the late sovereign lord king Henry the Eighth,
 " or that at any time hereafter should be allowed, set forth, ^{Sacrilegious}
 " or authorized by the queen's majesty; or if any person or ^{affrays}
 " persons shall unlawfully, contemptuously, or maliciously, of
 " their own power or authority, pull down, deface, spoil, or
 " otherwise break any altar or altars, or any crucifix, or
 " cross, in any church, chapel, or church-yard; every such
 " offender and offenders, his or their aiders, procurers or
 " abettors, may be apprehended by any constable, or church-
 " warden of the place where such offence shall be committed,
 " or by any other officer or person then being present at the
 " time of the said offence; and being so apprehended shall be
 " brought before some justice of peace by whom they shall be
 " committed forthwith, and within six days the matter shall
 " be examined by the same, together with some other justices;
 " and on proof by two witnesses, or confession, the offender
 " shall be committed for three months, and also till the next
 " quarter sessions, where, if they repent, they shall be dis-
 " charged upon giving sureties for their good behaviour for a
 " year, and if they do not repent they shall be committed till
 " they do."

Sect. 31. It hath been resolved, That the disturbance of a
 minister in saying the present common prayer is within this
 statute; for the express mention of such divine service, as should
 afterwards be authorized by queen Mary, doth implicitly in-
 clude such also as should be authorized by her successors; for
 since the king never dies, a prerogative given generally to one,
 goes of course to others;

2 Jon: 159.
 Con. Aic n 301
 2 Buist. 5:1

Sect. 32. Also it is enacted by 1 Will. and Mary, c. 18.
 f. 19. " That if any person shall willingly and of purpose,
 " maliciously or contemptuously come into any cathedral or ^{Disturbing a}
 " parish church, chapel, or other congregation permitted by ^{congregation;}
 " the said act, and disquiet or disturb the same; or misuse any
 " preacher or teacher, such persons; upon proof before any
 " justice of peace, by two or more sufficient witnesses, shall
 " find two sureties to be bound by recognizance in the penal
 " sum of fifty pounds, and on default of such sureties shall be
 " committed to prison, there to remain till the next general
 " or quarter sessions; and upon conviction of the said offence,
 " at the said general or quarter sessions, shall suffer the pain
 " and penalty of twenty pounds."

CHAPTER THE SIXTY-FOURTH.

OF FORCIBLE ENTRIES AND
DETAINERS.

Lamb. 135.
Dalt. c. 76.
Crom. 70.

Kellw. 92.
Yelv. 172.
C. Jac. 236.
Sep. c. 60. f. 23.
3 Comm. 4-5.
1 Inst. 134.
Hal. anal. 346.

IT seems that at the common law a man disseised of any lands, or tenements, (if he could not prevail by fair means,) might lawfully regain the possession thereof by force, unless he were put to a necessity of bringing his action, by having neglected to re-enter in due time: And it seems certain, That even at this day, he who is wrongfully dispossessed of his goods, may justify the re-taking of them by force from the wrongdoer, if he refuse to re-deliver them; for the violence which happens through the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought.

Sec. 2. But this indulgence of the common law, in suffering persons to regain the lands, they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours, and also by force to retain their wrongful possessions; it was thought necessary by many severe laws to restrain all persons from the use of such violent methods of doing themselves justice.

17 H. 7. 17.
21 H. 6. 39.
F. N. B. 249.
B. Force, 5, 11, 29.

Sec. 3. However, even at this day, in an action of forcible entry grounded on those laws, if the defendant make himself a title which is found for him, he shall be dismissed without any inquiry concerning the force. For howsoever he may be punishable at the king's suit, for doing what is prohibited by statute, as a contemner of the laws, and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. (1)

(1) An indictment will lie at common law for a forcible entry, though generally brought on the acts of Parliament. 3 Burr. 1732. But it must shew upon the face of it sufficient actual force. 3 Burr. 1702. Form of the indictment at common law, &c. vide Crown Circuit. 255.

Sec. 4. Since therefore offences of this nature are made such, not by the common law, but by statute; I shall for the better understanding thereof, consider the several statutes relating to this subject.

Sec.

Stat. 5. And first, I find it agreed, That by 2 Edw. 3. which is commonly called the statute of *Northampton*; if there be any use made of arms to strike a terror into the persons upon whom a forcible entry is made, any justice of peace or other officer, who is within the purview of that statute, may both seize the arms for the king's use, and also imprison the offenders, but not restore the party injured to his possession; but the said statute having been fully set forth in the foregoing chapter, I shall proceed to those statutes which more directly relate to this matter.

3 Inst. 161.
Crom. 162.
Dalt. c. 80.

Stat. 6. And first is enacted by 5 Rich. 2. c. 7. in the following words, " And also the king defendeth, That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will."

Stat. 7. But this statute being found by experience not sufficiently to have provided against the mischief intended to be redressed by it, inasmuch as it gave no speedy remedy to the party injured, against the wrong-doer, but left him to the common course of proceeding by way of indictment or action and made no provision at all against forcible detainers, it was, thought necessary to supply these defects by other additional laws.

And to this purpose it was further enacted by 15 Rich. 2. c. 2. " That the said statute and all others made against forcible entries, &c. shall be fully executed; and farther, That at all times that such forcible entries shall be made, and complaint thereof cometh to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly, after such entry made, they shall be taken and put in the next gaol, there to abide convicted by the record of the same justices or justice, until they have made fine and ransom to the king. And that all the people of the county, as well the sheriff as others, shall be attendant upon the same justices, to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine to the king: and in the same manner it shall be done of them that make such forcible entries in benefices or offices of holy church."

Stat. 8. In the exposition of this statute it hath been holden, That one justice of peace may make a record of such a forcible

8 Co. 221.
Dalt. c. 22

Lamb. 157.

(a) B. R. Hill

1708.

Salkeld 353.

Kellw. 41. 8.

Crom. 195, 196.

Dalt. c. 22.

Moore 248.

forcible holding, and that such record is not traversable, because the justice of peace in making thereof, acts not as a minister but as a judge. Also it hath (a) lately been solemnly resolved in colonel *Leighton's case*, That the same justice may assess the fine for this offence, either before the time of conviction, or after; but it is said, That such justice of peace hath no power to commit the offender to gaol, unless he do it immediately upon the fact, or unless the offender shall afterwards refuse to find sureties for his good behaviour. Also it was holden by the court in *Leighton's case* abovementioned, That if a person, against whom a complaint shall be made as having been guilty of a forcible entry, shall either traverse the entry or the force, or plead that he has been three years in possession, the justice may summon a jury for the trial of such traverse, for it is impossible to determine it upon view; and if the justice have no power to try it, it would be easy for any one to elude the statute by the tender of such a traverse, and therefore by a necessary construction, the justice must needs have this power as incidental to what is expressly given him.

Salkeld 353.

2 L. Ray. 1514.

2 Strange 794.

Bar K. B. 30,

38, 39.

Scit. Caf. 289.

Stat. 9. But this statute being likewise very defective in many respects, as in not giving any remedy against those who were guilty of a forcible detainer after a peaceful entry; nor even against those who were guilty of both a forcible entry and a forcible detainer, if they were removed before the coming of a justice of peace; and in not giving the justices of the peace any power to restore the party injured by such force to his possession; and also in not fixing any pain on the sheriff for not obeying the precepts of the justices in the execution of the said statutes; it was farther enacted by 8 Hen. 6. c. 9. "That from henceforth where
"any doth make any forcible entry in lands and tenements,
"or other possessions, or them hold forcibly, after complaint
"thereof made within the same county where such entry is
"made, to the justices of the peace, or to one of them, by
"the party grieved, that the justices or justice so warned,
"within a convenient time, shall cause, or one of them shall
"cause, the said statute to be duly executed, and that at the
"costs of the party so grieved."

Stat. 10. And it is farther enacted by the said statute,
"That though such persons making such entries be present,
"or else departed before the coming of the said justices or
"justice, notwithstanding the same justices or justice in some
"good town next to the tenements so entered, or in some
"other convenient place according to their discretion, shall
"have, and either of them shall have, authority and power
"to enquire by the people of the same county, as well of
"them that make such forcible entries in lands and tene-

"ments,

“ ments, as of them which the same hold with force. And
 “ if it be found before any of them, that any doth contrary
 “ to this statute, then the said justices or justice shall cause
 “ to reseize the lands and tenements so entered or holden as
 “ afore, and shall put the party so put out, in full possession
 “ of the same lands and tenements, so entered or holden as
 “ before.”

Sec. 11. And it is farther enacted by the said statute,
 “ That when the said justices or justice make such enquiries
 “ as before, they shall make, or one of them shall make, their
 “ warrants and precepts to be directed to the sheriff of the
 “ same county, commanding him of the king's behalf, to
 “ cause to come before them, and every of them, sufficient
 “ and different persons, dwelling next about the lands so entered
 “ as before, to enquire of such entries, whereof every
 “ man which shall be impanelled to enquire in this behalf,
 “ shall have land or tenement of the yearly value of forty shil-
 “ lings by the year, at the least, above reprises, and that the
 “ sheriff return issues upon every of them at the day of the
 “ first precept returnable, twenty shillings, and at the second
 “ day forty shillings, and at the third time an hundred shil-
 “ lings, and at every day after the double. And if any sho-
 “ riff or bailiff within a franchise having return of the king's
 “ writ, be slack, and make not execution duly of the said
 “ precepts to him directed to make such enquiries, that he
 “ shall forfeit to the king twenty pounds for every default,
 “ and moreover shall make fine and ransom to the king. And
 “ that as well the justices or justice aforesaid, as the justices
 “ of assizes shall have power to hear and determine such de-
 “ faults of the said sheriffs and bailiffs, at the suit of the king,
 “ or of the party grieved, &c.”

Sec. 12. And it is farther enacted by the said statute,
 “ That mayors, justices or justice of peace, sheriffs and bai-
 “ liffs of cities, towns and boroughs having franchise, have
 “ in the said cities, towns and boroughs, like power to re-
 “ move such entries, and in other articles aforesaid, rising
 “ within the same, as the justices of peace, and sheriffs in
 “ counties and countries aforesaid have.”

Sec. 13. But it is provided by the said statute, “ That
 “ they who keep their possessions with force in any lands and
 “ tenements, whereof they or their ancestors, or they whose
 “ estate they have in such lands and tenements, have continu-
 “ ed their possessions in the same by three years or more, be
 “ not endamaged by force of this statute.”

Sec. 14. And the said proviso was farther enforced and ex-
 plained by 31 Eliz. c. 11. by which it is declared and enacted,

“ That no restitution upon any indictment of forcible entry, or holding with force, be made to any person, if the person so indicted, hath had the occupation, or been in quiet possession, for the space of three whole years together, next before the day of such indictment so found, and his estate therein not ended; which the party indicted may alledge for stay of restitution, and restitution to stay till that be tried, if the other will deny or traverse the same. And if the same allegation be tried against the same person so indicted, he is to pay such costs and damages to the other party, as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied, as is usual for costs and damages contained in judgments upon other actions.”

Crom. 161, 166. *Stat.* 15. In the construction of these statutes it was holden, That if a lessee for years, or copyholder were ousted, and the lessor, or lord, disseised, and such ouster as well as disseisin were found in an indictment of forcible entry, the court might in their discretion award a restitution of possession to such lessee or copyholder, which was by necessary consequence a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. But it was a great question, Whether a lessee for years, or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 Hen. 6. the words whereof as to this purpose are, “ that the justice shall re-seise the lands &c.” by which it seems to be implied. That the party must be ousted of such an estate therein, whereof he may be said to be seised, which must be a freehold at least.

Yelv. 81.
Con. 1 Leon. 327.

Lomb. 155.
Crom. 71.
Dalt. c. 77.
Savil 68.
Farres, 123.

Stat. 16. But to remove this doubt, it is enacted by 21 Jac. 1. c. 15. “ That such judges, justices, or justice of the peace, as by reason of any act or acts of parliament then in force, were authorized and enabled upon enquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements, which shall be entered upon with force, or from them withholden by force, shall by reason of that act, have the like, and the same authority and ability from thenceforth (upon indictment of such forcible entries, or forcible withhold-ing before them duly found) to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knights-service, tenants by elegit, statute-merchant and staple, of lands or tenements, by them so holden, which shall be entered upon by force, or holden from them by force.”

Stat. 17. But it hath been holden, That a tenant by the verge, is not within this statute, because he is not within the express words; *sed quare*, for since such person hath no other evidence

Litch. 18s.
See Co. Lit. 61.

evidence of his title; but by the copy of court-roll, he seems at least to be within the meaning, if not within the words of the statute; however it seems clear, That if a lessor eject his lessee for years, and afterwards be forcibly put out of possession again by such lessee, he hath no remedy for a restitution by force, of any of the above-mentioned statutes, for he cannot have it by 8 Hen. 6. because he always continued seised of the freehold, and clearly he is not within 21 Jac. 1. c. 15.

Vide Salk. 587.
Crom. 71. 166.
Dalt. c. 77.

Sec. 18. However there seems to be no doubt, but that a justice of peace, &c. may, in either of the said cases, remove the force, and commit the offender, &c.

Lamb. 155.
Crom. 71.
Dalt. c. 75.
2 Keb. 495.

Sec. 19. Having thus set forth the several statutes relating to this subject, together with the mischiefs which occasioned them, and the several defects of each of them, I shall, for the better understanding of them all in general, proceed to examine the following particulars. First, What shall be esteemed an entry within these statutes. Secondly, What entry is to be adjudged forcible. Thirdly, What detainer. Fourthly, In respect of what kind of possessions one may be guilty of such forcible entry or detainer. Fifthly, What persons may be guilty thereof. Sixthly, What ought to be the form of a record grounded upon these statutes. Seventhly, Of what kind of possessions a restitution is to be awarded. Eighthly, To whom such restitution ought to be made. Ninthly, By whom, and in what manner, it is to be awarded and given. Tenthly, In what cases it may be barred by the continuance of a possession for three years. Eleventhly, For what other causes it may be stayed. Twelfthly, How it may be superseded before it is executed. Lastly, How it may be set aside after it is executed.

Strange 443.
794.
Ld. Ray. 1514.

Sec. 20. As to the first point, viz. What shall be esteemed an entry within these statutes. It seems certain, That if one who pretends a title to lands, barely go over them, either with, or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for such like purpose, without doing any act, which either expressly or impliedly amounts to a claim of such lands, he cannot be said to make an entry thereinto within the meaning of these statutes.

Crom. 70.
Dalt. c. 77.

Sec. 21. Yet in such case, if he makes an actual claim with any circumstances, of force or terror, he seems to be guilty of a forcible entry within 1 & 15. Rich. 2. whether his adversary actually quit his possession or not.

Crom. 69.
Dalt. c. 77.
Con C. Car 486.
2 Com. Dig. 363.

Sec. 22. Also all those who accompany a man when he makes a forcible entry, shall be adjudged to enter with him, within the intent of these laws, whether they actually came upon the lands, or not.

Crom. 69.
Dalt. c. 77.
B: 2. c. 29. l. 4.

Crom. 69.
Dalt. c. 77.
Co. Lit. 256.

Sett. 23. So also shall those who having an estate in land by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto,

Crom. 69.
Dalt. c. 77.
2 H. 7. 16.

Sett. 24. But he who barely agrees to a forcible entry made to his use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he no way concurred in, or promoted the force.

Lamb. 140, &c.
Dalt. c. 77.
Co. Lit. 257.
Hale 138.
1 S. 101.
1 Lev. 90.

Sett. 25. As to the second point, *viz.* What entry is to be adjudged forcible, it seems clear, that it ought to be accompanied with some circumstances of actual violence or terror; and therefore that an entry which hath no other force than such as is implied by the law, in every trespass whatsoever, is not within these statutes,

And therefore for the better understanding hereof, I shall consider; First, In respect of what acts of violence an entry may be adjudged forcible. Secondly, In respect of what circumstances of terror,

Sum. 116, 118,
2 Roll. 2.
Noy 136, 137.

39 Aff. 50.
11 " 17.
2 Inst. 235, 236.
Dalt.
Crom. 70.

Moor. 656.
Lamb. 143.

Sett. 26. As to the first of these particulars, It seems to be agreed, That an entry may be said to be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c. which being found in an assize of novel disseisin, will make the defendant a disseisor with force, and subject him to fine and imprisonment. And according to some opinions, an entry may be said to be forcible from the bare drawing up of a latch, or pulling back the bolt of a door; but surely such inconsiderable circumstances as these, which commonly pass between neighbour and neighbour, without any offence at all, can never bring a man within the meaning of these statutes, which speak of entries with strong hand, or multitude of people; and it hath been holden, That an entry into a house through a window, or by opening a door with a key, is not forcible. And it is said, That if one find a man out of his house, and so civilly withhold him from returning to it, and send persons to take peaceable possession thereof, in the party's absence, yet he is not guilty of a forcible entry, inasmuch, as he did no violence to the house, but only to the person of the other. But perhaps this opinion may justly be questioned, because though the force be not actually done upon the land, nor in the very act of the entry, yet since it is used with an immediate intent to make such entry, and is the only

cause it met with no opposition, surely it cannot be said, that the entry is without force, which whether it be upon, or off the land, seems equally within the statute.

Sec. 27. As to the second particular, *viz.* In respect of what circumstances of terror an entry may be adjudged forcible; it is to be observed, That wherever a man either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear, that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror, by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance, as if one say that he will keep his possession in spite of all men, &c.

Summary 128.
Lamb. 142, 266.
Dalt. c. 77.

10 H. 7. 12.
Crom. 69.

See the books
above cited.

Sec. 28. But it seemeth that no entry shall be judged forcible, from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage which is not personal,

B. Duresh, 32.
16.
1 Inst. 253.
Dalt. c. 77.

Sec. 29. However it is clear, That it may be committed by a single person, as well as by twenty.

Lamb. 143.

Sec. 30. As to the third point, *viz.* What detainer is to be adjudged forcible, it seemeth certain, That the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also; from whence it seems to follow, That whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter; and it hath been said, That he also shall come under the like construction, who places men at a distance from the house, in order to assault any one who shall attempt to make an entry into it; and that he also is in like manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in; But it is said, That a man ought not to be adjudged guilty of this offence, for barely refusing to go out of a house, and continuing therein in despite of another.

Summary 138.

Lamb. 145.
Crom. 70, 73.
Summary 139.
Dalt. c. 77.
C. Jac. 199.

Sec. 31. As to the fourth point, *viz.* In respect of what kind of possessions one may be guilty of a forcible entry or detainer within those statutes, it seems clear, That one may come within the danger thereof by a force done to ecclesiastical possessions, as (a) churches, (b) vicaridge-houses, &c. as much as if the same were done to any temporal inheritance;

(a) 1 Sid. 101.
1 Lev. 90.
1 Keb. 458.
(b) C. Jac. 41.

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also it hath been holden for a general rule, That one may be indicted for a forcible entry into any such incorporeal hereditament, for which a (c) writ of entry will lie, either by the common law, as for (d) rent, or by statute, as for (e) tithes, &c. But I do not find any good authority, That such an indictment will lie for a (f) common or (g) office; but it seems agreed, That an indictment of forcible detainer lies against any one, whether he be the tertenant or a stranger, who shall forcibly disturb the lawful (b) proprietor, in the enjoyment of any of the above-mentioned possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, &c. Yet it seems clear, That no one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like easement, which is no possession. Also it seemeth, That a man cannot be convicted upon view, by force of 15 Rich. 2. of a forcible detainer of any such tenement, wherein he cannot be said to have made a precedent forcible entry, because that statute gives the justices a jurisdiction of no other forcible detainer, but what follows a forcible entry.

(c) C. Car. 201.
 (d) 20 H. 6. 11.
 22 H. 6. 33.
 B. Force, 7.
 C. Car. 201.
 (e) C. Car. 201.
 (f) C. Car. 436.
 Dalt. c. 77.
 (g) C. Jac. 18.
 (b) Crom. 63.
 Lamb. 144.
 Dalt. c. 77.

1 Mod. 73.
 2 Keb. 709.

Vide Inf. l. 40.

Sett. 32. As to the fifth point, viz. Who may be guilty of a forcible entry or detainer within these statutes; it seems clear, That no one can come within the intention thereof by any force whatsoever done by him in entering into a tenement, whereof he himself had the sole and lawful possession, both at and before the time of such entry; as by breaking open the door of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it; or by forcibly entering into the land in the possession of his own lessee at will. *Sed quare.*

Moor. 786.
 C. Jac. 18.
 2 Keb. 495.

Sett. 33. But it seems clear, That a jointenant, or tenant in common, may offend against the purport of these statutes, either by forcibly ejecting, or forcibly holding out his companion, for though the entry of such a tenant be lawful *per my & per tout*, so that he cannot in any case be punished in an action of trespass at the common law, yet the lawfulness of his entry no way excuses the violence, or lessens the injury done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, &c. is good.

3 Ed. 4. 9, 19.
 10 H. 7. 27.
 King & Marrow,
 9 Geo. 2.
 B. R. H. 174.

Latch. 224.
 Palmer 419.

Sett. 34. Also if a man have been in possession of land for never so long a time; by a defeasible title, and another who hath a right of entry thereunto, make a claim, and yet such wrongful possessor still continue his occupation with force and arms, he is punishable for a forcible entry and detainer against the purport of these statutes, because all the estate whereof he was seised before such claim, was wholly defeated by it, and

Co. Lit. 256,
 257.
 Crom. 69.
 Lamb. 160, 161.
 Dalt. c. 77.

and his continuance in possession afterwards amounted in the judgment of law to a new entry.

Sett. 35. It is said, That an infant or feme covert may be guilty within the intention of these statutes, in respect of such actual violence as shall be done by them in person, but not in respect of what shall be done by others at their command, because all such commands of theirs are void: Also it is said, That a feme covert may be imprisoned for such offence, but that an infant ought not, because he shall not be subject to corporal punishment, by force of the general words of any statute, wherein he is not expressly named.

Dalt. c. 77.
Crom. 69.
Co. Lit. 357.

1 Hale 21.
B. Imp. 43, 45.

Sett. 36. As to the sixth point, viz. What ought to be the form of a record grounded upon these statutes, it hath been resolved, First, That it is sufficient in the caption of such an indictment, to say, that it was taken before *A. B. & C. D. Justiciariis ad pacem Domini Regis conservandam assignatis*, without shewing that they had authority to hear and determine felonies and trespasses; for the statute enables all justices of peace, as such, to take such indictments.

Palmer 277.
C. Jac. 633.

Sett. 37. Secondly, It hath also been resolved, That the tenement in which the force was committed, must be described with convenient certainty, for otherwise the defendant will neither know the special charge to which he is to make his defence, neither will the justices or sheriff know how to restore the injured party to his possession; and from hence it follows, That an indictment of a forcible entry into a (a) tenement (which may signify any thing whatsoever,) (b) wherein a man may have an estate of freehold, or into a house (c) or tenement, or into two closes of meadow (d) or pasture, or into a rood (e) or half a rood of land, or into (f) certain lands belonging to such a house, or into such a house, without shewing in what (g) town it lies, or into a (h) tenement with the appurtenances called *Trupenny* in *D.* is not good. But it hath been resolved, That an indictment for a forcible entry in (i) *domum mansionalem, sive messuagium, &c.* is good, for these are words equipollent: Also that such an indictment for an entry into a (k) close, called serjeant *Hern's* close, &c. without adding the number of acres, is good, for here is as much certainty as is required in an ejectment. And it hath been adjudged, that such indictment may be void as to such part thereof only which is uncertain, and good for so much as is certain, and therefore that an indictment for a forcible entry into a house, and certain acres of land thereto belonging, may be quashed as to the land, and stand good as to the house.

Dalt. c. 88.
3 Mod. 66.
12 Mod. 417.

(a) Dalt. 15.
2 Roll. 46.
2 R. Abr. 80.
3 Leon. 102.
(b) Co. Lit. 6.
(c) 2 R. Abr. 40.
1 Roll. 334.
C. Jac. 633.
Palmer 277.
(d) 2 R. Abr. 81.
(e) 1 Bulst. 201.
(f) 2 Leon. 186.
3 Leon. 102.
B. Forc. Ent. 23.
(g) 2 Leon. 186.
(h) 2 R. Abr. 80.
(i) C. Jac. 633.
Palmer 277.
(k) C. Eliz. 458.
2 R. Abr. 80.

2 Leon. 186.
3 Leon. 102.

Sett. 38. Thirdly, It hath been also resolved, That an indictment on 5 or 15 Rich. 2. needs not shew who had the freehold at the time of the force, because those statutes seem

St. 21 Jac. 1.
2 Keb. 495.
3 Bulst. 71.

equally

1 Ven. 23. 25.
1 Sid. 102, 306.
21 Mod. 273.

1 Ven. 59.
2 Keb. 495.
Salk. 260.
Sayer 142, 225.

Hetley 93.
Litch 109.
2 Keb. 477, 499.
Lut. 1543.
1 Keb. 191.
C. Elis. 754.
Noy 131.
2 Rol. 65.
1 Sid. 102.
Con. Yelv. 23.
1 Butt. 177.
Show, 272.
Con. 1 Ven. 306.
3 Leon. 102.
Allen 49.
Palmer 277, 426.
Con. 2 R. A. 30.
Cro. Jac. 214.
633, 939.

2 R. Abr. 80.

Yelv. 163.

Farres 123.

1 Ven. 306.

equally to punish all force of this kind, without any way regarding what estate the party had on whom it was made; yet it seems, That such an indictment ought to shew that such entry was made on the possession of some person, who had some estate in the tenements, either as a freeholder or lessee for years, &c. for otherwise it doth not appear, that such entry was made injurious to any one. But it is said, That an indictment on 8 Hen. 6. must shew, that the place wherein the force was committed was the freehold of the party grieved at the time of such force; and therefore, That it is not sufficient to say that the defendant with strong hand, &c. entered into such a house, *existens liberum tenementum J. S. &c.* without saying, *ad tunc existens liberum tenementum J. S.* for otherwise it may be intended, that it was his freehold at the time of the indictment only, and not at the time of the force; and according to the general opinion, an indictment on that statute cannot warrant an award of restitution, unless it find, that the party was seised at the time. Yet it is said, That the want of such an express finding may be supplied by such words as necessarily imply, that the party was seised at the time of the force; as where it is expressly laid that the defendant disseised *J. S. &c.* which is impossible, unless he had been seised of the freehold at the same time; and it hath been said, That it is sufficient in such an indictment to say that the party was *possessionatus pro termino vite*, without using the word *seistus*, &c. for the same propriety of expression is not required in indictments as pleadings; *sed quare*. Also it is said, That if it do appear either in such an express or implicit manner, that the party injured had the freehold of the land at the time of the force, it is not necessary to shew farther what estate in particular he had therein, or by what title he claims the same; for it is not the title, but the possession, which is in question. And upon the like ground it hath been adjudged, That an indictment on the said statute for entering on my farmer, and forcibly expelling him, and disseising me, is good, without shewing what estate such farmer had; for it is sufficient to shew that he had the possession, and the injury complained of is the forcible disseisin done to me, which, being the main point of the indictment, if it be sufficiently set forth in substance, the indictment is good; yet in this very case the want of shewing that such farmer was ousted, would have been an incurable fault; because his possession being my possession, unless he were ousted, I could not be disseised. Also it hath been holden, That as an indictment on 8 Hen. 6. must shew that the party who is put out of possession was seised of a freehold, in order to bring him within the purview of that statute, so also an indictment on 21 Jac. 1. c. 15. must shew, That the party injured was possessed of such an estate, as will bring him within the provision of that act; and upon this ground it hath been resolved, That such an indictment, setting forth in general,

general, That the party was possessed, or that he was possessed for a certain term, without adding, that it was for years, is not good; for in the first case it may be intended, That he was possessed only by virtue of a lease at will; and in the second, That he was possessed of a term for life; in neither of which cases he is within the benefit of 21 Jac. 1. c. 15. Yet it hath been said, That the possession of such an estate, as is within that statute, is sufficiently set forth in the reciting part of an indictment, as thus, *quod cum J. S. was possessed for a certain term of years, and being so possessed, was by strong hand, &c. put out of possession, &c. without any direct allegation of such a possession.*

1 Sid. 102.
1 Mod. 73.
2 Keb. 709.
Salk. 260.
Farris 123.

1 Mod. 73.

Sec. 39. Fourthly, it hath been resolved, That a repugnancy in setting forth the offence in an indictment upon any of these statutes, is an incurable fault; and upon this foundation it hath been adjudged, That an indictment on 8 Hen. 6. setting forth, that the defendants *pacifed intraverunt, &c. & cum adunc & ibidem vi & armis disseisiverunt*, or that *J. S. was seised and possessed*, is void; and it hath also been adjudged, That an indictment on 21 Jac. 1. setting forth, That the party injured was possessed of a term for years, or of a copyhold estate, and that the defendants with strong hand ousted and disseised him, is void, because it is absurd and contradictory to set forth a disseisin of such an estate whereof it is impossible that any man can be disseised; also it hath been holden, That an indictment on 8 Hen. 6. setting forth a disseisin of land, *adunc & adhuc existens liberum tenementum J. S. is void for its repugnancy*, inasmuch as it implies, That *J. S. always continued in possession*, which, if it be true, makes it impossible that he could be disseised at all; but some have said that this seeming repugnancy may be reconciled, by intending that the disseisee might re-enter after the time of the disseisin, and before the finding of the indictment; however it seems clear, That if the words *adhuc extratenet* be added, such a repugnancy cannot be helped by any intendment; and that no restitution can be awarded on such an indictment, whether those words *adhuc extratenet* be in it or not, because the party grieved appears by the indictment itself to have had the freehold at the time of the finding thereof.

Aleyn 50.
Show. 272.
1 Vent. 108.
Popham 205.
Raymurd 67.
1 Keb. 423, 428.
435, 472.

2 Roll. 311.
Show. 272.
2 Bullst. 178.
1 Sid. 102.

Sec. 40. Fifthly, It hath been resolved, That an indictment of a forcible detainer, without shewing that the defendant made an entry into the same lands, is not good, because the statute doth not prohibit one who hath always been in possession, to maintain the same with force. And it seems clear, That a conviction of a forcible detainer upon view, by force of 15 Rich. 2. cannot be good, unless it shew that the defendant was also guilty of a forcible entry, for the words of that statute are, "That at all times that such forcible entries are made, and complaint thereof cometh to the jus-

2 R. Abr. 30.

Palm. 195, 106.
107.
C. Jac. 19.
32.
C. 12. 90.

"ties,

B.R.Hill.1708.

" tices, &c. that the same justices, &c. shall go, &c. and if they find any that hold such place forcibly, after such entry " made, &c." by which it is plain, That the justices have no jurisdiction by force of this statute, but where the entry, as well as detainer, was forcible: Yet in *Leighton's* case it was resolved, That such a forcible entry is sufficiently set forth in the complaint recited in such a conviction; and it is plain, That the statute could not intend that the forcible entry should be viewed, because it is to precede the proceedings of the justices; but perhaps it is the better opinion, That an indictment upon 8 Hen. 6. setting forth an entry and forcible detainer, without shewing whether the entry were forcible or peaceable, is good; for there is no *medium* between a forcible and peaceable entry; and an entry not alledged to have been forcible, shall be intended to have been peaceable, or if not so, yet it seems to be no way material, whether it shall be taken to have been forcible or peaceable, because in either case it is equally within the statute, the words whereof as to this purpose are, " Where any doth make forcible entry in lands and tenements, or other possessions, or them hold forcibly;" by which it appears, That a forcible detainer is a distinct offence from that of a forcible entry, and no way depending on it; and my lord chief justice Holt seemed to be of this opinion in *Leighton's* case above-mentioned. However it seems to be certain, That if a bill both for a forcible entry and forcible detainer be preferred to a grand jury, and found *ignoramus* as to the entry with force, and *billa vera* as to the detainer, it will not warrant an award of restitution, but is void, because the grand jury cannot find a bill true for part, (a) and false for part, as a petit jury may.

2 R. Abr. 80.

Yelv. 99.

C. Jac. 151.

1 Sid. 97, 99,

414.

2 Keb. 505.

Vide inf. l. 59.

B. 2. c. 25. l. 2.

(a) Vide Rex
v. Fieldhouse,
Cowper 325.

Salk. 260.

B. Force, 13.

Lamb. 153.

Dalt. c. 81.

Summary 140.

Hard. Ca. 174.

Savil 68.

Strange. 474.

Sec. 41. Sixthly, It hath been resolved, That no indictment can warrant an award of restitution, unless it find that the wrong-doer both ousted the party grieved, and also continueth his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is vain to award it to one who doth not appear to have lost it.

C. Jac. 41, 151.

Sec. 42. Seventhly, It hath been resolved, that the time and place of the disseisin are sufficiently set forth in an indictment, alledging, That the defendant *tali die intravit, &c. & ipsum A. B. manu forti disseisivit*, without adding the words *ad tunc & ibidem*; for inasmuch as the entry and disseisin are both of them of the same nature, and the one of them naturally tends to cause the other, it is implied, that they both happened at the same time; and the forcible entry being the principal offence within the purview of these statutes, and the disseisin being only added to shew that the party grieved hath a right to a restitution, as to which the day of the disseisin is no

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way material, it seemeth to be over nice to require a precise exactness in setting it forth; neither can it be to any purpose to alledge that the disseisin was at the same place with the entry, since it appears from the nature of the thing, that it could not but be so. Yet in an indictment of murder, it is perhaps a fatal mistake, not expressly to shew the day and place of the stroke, as well as of the assault, because these offences are of different kinds, the one being only a trespass, and the other a felony, and may well be intended to have happened at different times and places, and the giving of the stroke being the principal offence, ought to be set forth with the most exact certainty.

B. 2. c. 23. f. 82.

Dyer 68.

Sect. 43. Eighthly, It hath been resolved, That a disseisin is sufficiently set forth, by alledging, That the defendant entered, &c. into such a tenement and disseised the party, without adding, either the words (a) *illicite*, or (b) *expulit*, (c) *inde*, for the word *disseisuit* implies as much.

Sayer 225.
(a) Noy 125.
(b) C. Jac. 32.
(c) C. Eliz. 86.
Con. Noy 120.

Sect. 44. Ninthly, It hath been resolved, That an indictment which pursues the words of the statute in alledging an entry, &c. to have been made *manu forti*, needs not expressly also to say, That it was made *vi et armis*, because that is implied. Also it is said, That as the want of those words will not vitiate an indictment, which pursues the statute, so neither will the using of them make good an indictment which does not pursue it; yet it hath been resolved, That such an indictment may be good without mentioning any complaint, though the statute seems to require it; for it is said, That those words in the statute are put in *causa abundanti*; and that if a justice of peace have by any means whatsoever notice of a forcible entry or detainer, he may and ought to proceed against the same according to the said statute, as being a disturbance of the publick peace, the preservation whereof was the chief end of these statutes.

11 Mod. 235.
C. Eliz. 461.
Litch. 224.
2 Bulf. 258.
B. 2. c. 25. f. 92.
Con. 1 Keb. 57e.
2 Keb. 133, 135.
1 Vent. 265.
3 Burr. 1732.
3 Burr. 1699.

7 Ed. 4. 18.
Dalt. 25.

Sect. 45. As to the seventh point, *viz.* Of what kind of possessions a restitution is to be awarded; it seems that it ought only to be awarded for the possession of such tenements as are visible and corporeal; for no one who hath a right to such as are invisible and incorporeal, as rents, commons, &c. can be put out of possession thereof, but only at his own election, by a fiction of law; in order to enable him to recover damages against the person who hath wrongfully disturbed him in the enjoyment of them; for such things being mere creatures of the law, and depending entirely upon the construction thereof, are always in the possession of those whom the law adjudges to have a right to such possession, and consequently all the remedy that can be desired against a force offered to a

Dalt. c. 87.
Lamb. 153.

Co. Lit. 323.

man in respect of such like possessions, is to have the actual force removed, and the offenders punished for the same, which may be done by the force of 15 Rich. 2. &c.

Dalt. c. 83.
Lamb. 153.

Lamb. 154.
Dalt. c. 83.
Vide C. Jac. 199.

Sec. 46. As to the eighth point, *viz.* To whom such restitution ought to be made; it hath been holden, That it shall only be given to him who is found by the indictment to have been put out of an actual possession, and consequently that it shall not be awarded to one who was only seised in law, as to an heir upon whom a stranger abateth upon the death of the ancestor, before any actual entry made by such heir; and from the same ground it followeth, That it shall not be granted to an heir upon an indictment, finding a forcible entry made upon his ancestor,

Crom. 162, 163.

Sec. 47. It hath been holden by some, That if a disseisor re-enter peaceably upon the disseisor, and continue for some time peaceably upon the tenements in dispute, and afterwards detain them with force, the disseisor shall not be restored upon an indictment finding the said force, because his possession was at first peaceably defeated, and at the time of the force, he had, in the judgment of law, no possession at all. But I cannot be persuaded that this opinion is agreeable to the intention of the said statutes, the principal end whereof seems to be to oblige all persons to refer themselves to the courts of justice, for the decision of their claims to the possession of land, and to restrain them from disturbing the public peace, by such endeavours to right themselves; but if such a practice as this should be allowed, it would be easy to evade the effect thereof by refraining from violence at first, and then forcing the party to leave the possession of the premises after a short continuance thereon in peace; neither do I see any difference between such a continuance for the space of three days, and a continuance for three hours or minutes, inasmuch as the subsequent force is in each case equally within the mischief intended to be provided against by the statutes; and seeing the statutes of 8 Hen. 6. and 31. Eliz. c. 11. have expressly provided, That those who have been in possession for three years, shall not be put out of possession by an indictment of forcible entry or detainer; it seems plainly to be implied, That no one shall have the like advantage, in respect of a possession for a shorter time,

Sec. 48. It will be needless in this place to shew of what kind of hereditaments, or of what kind of estate therein, the party who is to be restored must be found to have been seised or possessed, because this may sufficiently appear by what hath been said in the foregoing part of this chapter.

Comyns 61.

Sec. 49. As to the ninth point, *viz.* By whom and in what manner such restitution may be awarded and given; there is no doubt, but that the same justice, before whom an indictment

indictment of forcible entry or detainer shall be found, may grant an award of restitution to the party; and it is said, That he may execute the same either in his own proper person, or make his precept to the sheriff to do it.

Dalt. c. 82.
Dyer 187.
12 Mod. 495.

Sec. 50. But it seems clear, That neither justices of peace, nor any other court whatsoever, have authority to grant a restitution upon a conviction of any force taken by them upon view, unless the same be found by an indictment, according to the direction of 8 Hen. 6. c. 9. or 21 Jac. 1. c. 15. (2) Also it seems to be agreed, That no other justices of peace, except those before whom such an indictment shall be found, have any power, either at sessions, or out of it, to make any award of restitution; and that no other court whatsoever can personally restore the party without a precept to the sheriff.

1 Sid. 156.
1 Keb. 88.
1 Ven. 308.
Dyer 187.
Dalt. c. 82.
Lamb. 184.

(2) Vide 4 Cuth. Dig. 366. where it is said that a justice of peace or sheriff may break open a house to make restitution.

Sec. 51. Also it hath been resolved, that justices of oyer and terminer have no power, either to inquire of a forcible entry or detainer, or to award restitution on any such indictment; because when a new power is created by statute, and certain justices are assigned to execute it, it cannot regularly be executed by any other; and inasmuch as justices of oyer and terminer have a commission entirely distinct from that of justices of peace, they shall not from the general words of their commission, *Ad inquirend' de omnibus transgr' & de omnibus aliis articulis & causis cont' formam quoruncunque statutorum facti' sive perpetrat'*, be construed to have any such powers as are specially limited to justices of peace. Yet it hath been resolved, That the justices of the King's Bench may award restitution upon an indictment of forcible entry or detainer removed before them, because the said justices having a supreme and sovereign jurisdiction over all matters of a criminal and publick nature, have always been esteemed to have power in all causes of this nature, being brought judicially before them, to give the parties such remedies in relation thereto, as they shall appear to have a right to demand, either by common law, or by statute.

Kellw. 159.
Dalif. 25.
9 Co. 118.
11 Co. 65.

Farres 133.
7 Ed. 4. 18.
4 H. 7. 18.
Dalt. c. 82.

Sec. 52. The sheriff, if need be, may raise the power of the county to assist him in the execution of a precept of restitution, and therefore, if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced.

Lamb. 157.
Dalt. c. 82.

Sec. 53. As to the tenth point, *viz.* How such restitution should be barred by the continuance of a possession for three years; it appears from the above-mentioned proviso of 8 Hen. 6. and also by 31 Eliz. c. 11. That any one indicted upon these statutes, may alledge such possession to stay the award of restitution; in the construction whereof it hath been holden, That such possession must have continued without in-

Salkeld 260.
Cartlew 498.
12 Mod. 269.
Farres 138.
Dalt. c. 79.
Groompton 711.
Summary 639.
Dyer 141.
20 H. 6. 12.

B. Force, 22, 29.
1 Inst. 256.
Raymond 85.
1 Sid. 149.

interruption during three whole years next before the indictment; and therefore that he who having been in possession of land for three years or more, is forcibly ousted, and then restored by force of the statute of 8 Hen. 6. cannot justify a forcible detainer, till he have been in possession again for three years after such restitution; and also for the same reason it hath been said, That he who under a defeasible title hath been never so long in possession of land to which another hath a right of entry, cannot justify such a detainer at any time within three years after a claim made by him who hath such a right, because all defeasible estates in the land are wholly defeated by such a claim, and the subsequent continuance in possession amounted to a new entry.

Dalb. c. 79.
22 H. 6. 18.
Crompton 71.

Holding over by force, where the tenants title was under a lease now expired, is said to be a forcible detainer.
Cro. Jac. 199.

Sett. 54. There have been some opinions, That the three years possession must be of a lawful estate, and consequently that a disseisor's continuance in quiet possession for never so many years, shall not justify a forcible detainer; but it seems necessary to make a distinction between a detainer against him who has a right of entry, and a detainer against a stranger, or one who by his laches has lost his right of entry; for I do not see why three years continuance of a defeasible possession should not justify a detainer by force against a stranger, inasmuch as he cannot take advantage of another's right, and bare possession is a good title against all persons, except him who hath the right, and cannot be lawfully defeated by any other. Also if one who has the mere right to lands, have so long neglected to recover the possession thereof, till in judgment of law he hath no more right to such possession, till he have recovered it by action, than a mere stranger, there doth not seem to be any reason that he should have more advantage against a forcible detainer, than if he were a mere stranger.

4 Comm. 149.

Sett. 55. Also it hath been holden, That a peaceable continuance in possession for three years after a forcible entry, under any title whatsoever, will not justify a forcible detainer, inasmuch as the possession was at first gained by force. But I cannot think this a reasonable construction of the said statutes, for the force in the detainer being after three years quiet possession, seems justifiable by the express words of the statute; and where the force used in gaining a possession is afterwards wholly laid aside, there seems to be no colour to say, That it makes the subsequent possession less quiet or peaceable than it would have been, if there had been no force at all used at the first.

1 Keb. 538.
K. v. Burgess.
Bawle 261.

Sett. 56. It seems clear from the express purview of the said statute of 31 Eliz. c. 11. That wherever the defendant pleadeth such a possession in bar of restitution upon such an indictment, either before the justices of peace, or in the king's bench, no restitution ought to be awarded till the truth of the plea

plea be tried; and it hath been holden, That the plea of such a possession is good, without shewing under what title, or of what estate such possession was, because it is not the title, but the possession only, which is material in this case.

Sett. 57. It seems that from the wording of 31 Eliz. c. 11. "if one who has been in possession for three years, be ousted, and the same day re-enter with force, and also be indicted for such re-entry on the very same day, it may be questioned whether the prosecutor ought to have restitution, inasmuch as the words of the statute are, "That there shall be no restitution, &c. if the person indicted have been in quiet possession for three years next before the day of the indictment found;" and here the defendant hath been in possession three years before the day of the indictment, though not three years before the indictment, inasmuch as he was ousted the same day. But if it be considered, That the circumstance of finding the indictment on that day no way affects the merits of the case, or lessens the offence any more than if it were found in any other day, and that restitution must have been awarded if it had been found on another day, and that the mischief complained of in the preamble is, that persons were by colour of such indictments often turned out of their possessions which they had quietly enjoyed for three years next before such indictments found, which does not extend to the defendant in the present case, I rather incline to think, that restitution might be awarded to the prosecutor in this case, inasmuch as it clearly appears, That the defendant's possession hath not had three years uninterrupted continuance within the intent of the statute.

Sett. 58. As to the eleventh point, viz. For what other causes such restitution may be stayed; it seemeth to be settled at this day, That if the defendant tender a traverse of the force, which must be done in writing, and not by a bare denial of the force by parol, the justice ought not to make any restitution, till the traverse be tried; in order whereunto he must award a *venire facias*, whereon a jury must be returned, on whose verdict the award of restitution ought to depend.

Sett. 59. It hath been resolved, That if such a jury find part of the indictment to be true, and part of it to be false; yet if they find so much thereof to be true as will warrant a restitution, the justice ought to restore the party: as where, on an indictment of forcible entry and forcible detainer, the jury find that the entry was peaceful, and the detainer was only forcible.

Sett. 60. As the justice is bound to stay the award of restitution, upon the defendant's tendering a traverse of the force, so it hath also been said, That he ought not to make such an award in any case in the defendant's absence, without calling him to answer for himself; for it is implied by natural justice, in

the construction of all laws, That no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself.

Dyer 187.
Summary 140.
Crem. 165.
Dalt. c. 81, 84.

Sett. 61. As to the twelfth point, *viz.* How such a restitution may be superseded before it is executed; there is no doubt but that the same justices, by whom a restitution is awarded upon an indictment of forcible entry or detainer found before them, may also afterwards, upon an insufficiency of the indictment appearing unto them, supersede the same before it is executed: And it hath also been said, That if such an indictment be taken, and restitution awarded by four or five justices, that two or even one of the same justices may supersede the execution thereof; as well as more or all of them. But it seems to be agreed, That no other justices, or other court whatsoever, have such power, except the King's Bench.

C. Eliz. 915.
Yelv. 32.

C. Eliz. 915.
Yelv. 32.
Moor. 677.
1 Keb. 93.
Summary 141.
Stuarg. 474.

Sett. 62. However it is certain, that a *certiorari* from the King's Bench is a *superfedeas* to such restitution; for every such *certiorari* has these words *coram nobis terminari volumus & alibi*, and consequently it wholly closes the hands of the justices of peace, and avoids any restitution which is executed after the *teste*, but does not bring the justices of the peace, &c. into a contempt, unless they proceed after the delivering thereof.

Sayer 176.

Stvil 68.
Sum. 140, 141.
C. Eliz. 31.
Sup. f. 58.

Sett. 63. As to the thirteenth point, *viz.* How such restitution may be set aside after it is executed; it is certain, That the justices of the King's Bench, having a general superintendent power over all the proceedings whatsoever of justices of peace, may set aside any such restitution, if it shall appear to them to have been either awarded or executed against law; as where the indictment whereon it was grounded, being removed before them, appears to be insufficient, and thereupon is quashed; or the defendant traverses the force and gets a verdict in the King's Bench, or wherever it sufficiently appears that the justices of peace have been irregular in their proceedings, as by refusing to try a traverse of force tendered by the defendant, &c.

Noy 119.
Yelv. 93.
C. Jac. 148, 149.

Sett. 64. Yet if an indictment on these statutes be removed into the King's Bench, and the defendant having been turned out of possession by the grant of restitution to the prosecutor by the justices of peace, traverse the force in the King's Bench, and then the offence be pardoned by a general pardon, the court cannot proceed on the trial, notwithstanding the defendant would waive the benefit of the pardon, because it appears judicially, That the king can have no benefit of a fine from the defendant if the verdict pass against him; and the court will never falsify an indictment, which is found

R. 2. c. 37.
L. 61.

by the oaths of twelve men, by bare affidavits; and consequently in this case the defendant can have no remedy to set aside the restitution by controverting the truth of the indictment.

Sec. 65. Neither can a defendant in any case whatsoever, *ex rigore juris*, demand a restitution, either upon the quashing of the indictment, or a verdict for him on a traverse thereof, &c. for the power of granting a restitution is vested in the King's Bench, only by an equitable construction of the general words of the statutes, and is not expressly given by those statutes; and is never made use of by that court, but when upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor.

Raymond 85.
1 Keb. 343, 344.
2 Keb. 505.
Summary 141.
C. Eliz. 916.
Salk. 587.
Dyer 123.
2 Keb. 571.
Savil 62.

Sec. 66. The court of King's Bench hath been so favourable to one, who, upon his traverse of an indictment upon these statutes being found for him, hath appeared to have been unjustly put out of his possession, that they have awarded him a re-restitution, notwithstanding it hath been shewn to the court, that since the restitution granted upon the indictment, a stranger hath recovered the possession of the same land in the lord's court.

C. Ells. 41.
For the form of the indictment vide 2 Burr's Junice 220.

CHAPTER THE SIXTY-FIFTH.

OF RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

IN treating of riots, routs, and unlawful assemblies, I shall consider, First, What shall be called a riot, rout, or unlawful assembly. Secondly, How they may be suppressed and punished by the common law. Thirdly, How by statute.

12 Mod. 510.

Sec. 1. A RIOT seems to be a tumultuous disturbance of the peace, by three persons, (a) or more, assembling together of their own authority, with an intent mutually to assault one another, against any who shall oppose them, in the execution of some enterprize of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (b)

(a) Vide 1 Ven. 251.
Salk. 594, 405.
Dalt. c. 85, 86.
87.
Crom. 61, &c.
Pulton 25, &c.
3 Inst. 176.
Summary 137.
3 Mod. 141.
(b) See Salk.

594. Popham 202. 1 Ld. Ray. 484. 12 Mod. 352, 509. Strange 196. 11 Mod. 115, 116.
117. 1 Black. 350.

For the better understanding whereof, I shall consider the following particulars:—First, How far such an assembly may become riotous through the want of legal authority expressed or implied, or be excusable by reason of such authority.—Secondly, How far the intention with which the parties assemble together must be unlawful.—Thirdly, With what kind of violence or terror the intended enterprise must be executed.—Fourthly, How far the grievance intended to be redressed must be of a private nature.—Fifthly, Whether the unlawful execution of an act in its own nature lawful may not make an assembly riotous.

Sec. 2. As to the first point it seems, That wherever more than three persons (1) use force and violence, in the execution of any design whatever wherein the law does not allow the use of such force, all who are concerned therein are rioters. (A) But in some cases wherein the law authorizes force, it is not only lawful, but also commendable to make use of it; as for a (a) sheriff or (b) constable, or perhaps even for a private (c) person, to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters, and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *peace*, in order to remove a force in making an entry into, or detaining of lands. Also it seems to be the duty of a (d) sheriff, or other minister of justice, having the execution of the king's writs, and being resisted in endeavouring to execute the same, to raise such a power as may effectually enable them to overpower any such resistance; yet it is said not (e) to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain, That they are highly punishable for using any needless outrage, or violence therein,

(1) The words "more than three persons," are three times over (i. e. §. 7.) inserted instead of "three persons or more," in instance, that in a variety of matter it is impossible for the mind of man to be always equally attentive. 4 Burr. 88. (A) Burr. 1262. K. v. Scott and Harris. 1 Black. 350. (a) 2 Ann. 67. Popham 121. (b) 1 H. 7. 10. (c) Pom. 121. Moor 656. Infra c. 47. f. 8. (d) 2 Inst. 193. (e) 3 Inst. 161.

Sec. 3. As to the second point, viz. How far the intention with which such persons assemble together must be unlawful; it seems agreed, That if a number of persons being met together at a fair or market, or church-ale, or any other lawful or innocent occasion happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of sudden affray only, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace, happened unexpectedly without any previous intention concerning it. Yet it is said, That if persons, innocently assembled together, do afterwards upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may a

Lamb. 179, &c. Dalt. c. 86. Grom. 61. 62. 6 Mod. 43. Skinner 118. Salkeld 595.

properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design: However it seems clear, That if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house or inclosure, or to do any other act of violence to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose, is no way extenuated by their having met at first upon another. Also it seems to be certain, That if a person seeing others actually engaged in a riot, do join himself unto them, and assist them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself unto them, with an intention to second them in the execution of their unlawful enterprize; and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot, were in truth one of the first assembly, or actually had a previous knowledge of the design thereof.

Vide *Rex v. John Royce*,
Burrow 2073.

6 Modern 43.

Sec. 4. As to the third point, viz, With what kind of violence or terror, the intended enterprize must be executed, it hath been holden, That it ought to be accompanied with some offer of violence, either to the person of a man or to his possessions, as by beating him, or forcing him to quit the possession of his lands or goods, &c. And from hence it seems to follow, That persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly,

Dalt. c. 85.
Lamb. 175.
3 Inst. 176.

Sec. 5. However, it seems to be clearly agreed, That in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew (a) of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*: (2) And from hence it clearly follows, That assemblies at wakes, or other festival times, or meetings for exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. And from the same ground also it seems to follow, That it is possible for more than three persons (3) to assemble together, with an intention

(a) Lamb. 178.
Dalt. c. 87.
3 H. 7. 1.
6 Mod. 147.
2 Keb. 558.
Con. 1. Roll.
109.
3 Burr. 1207.
11 Mod. 206.
Lamb. 176.

(2) Vide the opinion of Holt, C. J. in the case of the Queen v. Soley, 11 Modern 115.

(3) It should be "three persons or more," vide note (1) to Section 2.

Pulton 25.
3 Keb. 578.
Hobart 91.

Lambard 178.
Crompton 62.
Quere.

6 Mod. 141.
2 Keb. 553.
Con. 1 Mod. 13.
7 Ven. 369, 380.
41 Modern 116.

to execute a wrongful act, and also actually to perform their intended enterprize, without being rioters; as if a competent number of people assemble together, in order to carry off a piece of timber to which one of the company hath a pretended right, and afterwards do carry it away without any threatening words, or other circumstances of terror. And from the same ground it seems also to follow, That persons assembled together in a peaceful manner to do a thing prohibited by statute, as to celebrate mas, &c. and afterwards peacefully performing the thing intended, cannot be said to be rioters; for there seems to be no reason why an assembly should become riotous barely for doing a thing contrary to statute, any more than for doing a thing contrary to common law.

Sec. 6. As to the fourth point, viz. How far the grievance intended to be redressed must be of a private nature; it seems agreed, That the injury or grievance complained of, and intended to be revenged or remedied by such an assembly, must relate to some private quarrel only; as the inclosing of lands, in which the inhabitants of a town claim a right of common, or gaining the possession of tenements, the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, no way concerning the publick; for wherever the intention of such an assembly is to redress publick grievances, as to pull down all inclosures in general, or to reform religion, or to remove evil counsellors from the king, &c. if they attempt with force to execute such their intentions, they are in the eye of the law guilty of levying war against the king, and consequently of high treason, as appears from chapter seventeen, section twenty-five.

Quere and vide
Salk. 594, 525.
Crom. 64, 66.
Dalton c. 37.

(4) It should be
"three persons
or more," vide
1. c. 2.

3 Modern 1.
13 Mod 117.
7 Snow. 236.
12 Mod. 648.

Sec. 7. As to the fifth point, viz. Whether the execution of an act in its own nature lawful, may make an assembly riotous; it hath been generally holden, That it is no way material whether the act intended to be done by such an assembly, be of itself lawful, or unlawful; from whence it follows, That if more than three persons (4) assist a man to make a forcible entry into lands, to which one of them has a good right of entry, or if the like number in a violent and tumultuous manner join together in removing a nuisance, which may lawfully be done in a peaceful manner, they are as properly rioters, as if the act intended to be done by them were never so unlawful; for the law will not suffer persons to seek redress of their private grievances, by such dangerous disturbances of the publick peace: However the justice of the quarrel in which such an assembly doth engage, is certainly a great mitigation of the offence.

Sec. 8. A Rout seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intention to do a thing, which if it be executed

ted will make them rioters, and actually making a motion towards the execution thereof: But by some books, the notion of a rout is confined to such assemblies only, as are occasioned by some grievance common to all the company; as the inclosure of land in which they all claim a right of common, &c. However inasmuch as it generally agrees with a riot as to all the rest of the above-mentioned particulars, requisite to constitute a riot, which have been already fully explained, except only in this, That it may be a compleat offence without the execution of the intended enterprize, it seems not to require any farther explication.

Lamb. 175, 176.
Crom. 61.
Dalt. c. 85.
B. Riots, 4, 5.
Pulton 25.

Sett. 9. AN UNLAWFUL ASSEMBLY, according to the common opinion, is a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which if it were executed would make them rioters, but neither actually executing it, nor making a motion toward the execution it. But this seems to be much too narrow a definition. For any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the publick peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly.

Crompton 61.
B. Riots, 4.
Pulton 25.
Dalt. c. 95.

Sett. 10. Also an assembly of a man's friends for the defence of his person, against those who threaten to beat him, if he go to such a market, &c. is unlawful; for he who is in fear of such insults, must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. Yet an assembly of a man's friends in his own house, for the defence of the possession thereof, against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is indulged by law; for a man's house is looked upon as his castle.

Hobart 92.
Saik. 594, 595.
1 Ven. 369, 380.

21 H. 7. 39.
Lamb. 179, 182.
Summary 13.
Crom. 64.
B. Riots, 1.
5 Co. 91.
11 Mod. 116.

Sett. 11. As to the second point, viz. How far offences of this nature may be suppressed and punished by the common law; it seems clear, That every sheriff, under-sheriff, and also every other peace officer, as constables, &c. may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons whatsoever to assist them therein. Also it is certain, That any private person may lawfully endeavour to appease all such disturbances by staying those whom he shall see engaged therein from execut-

Popham 121.
3 H. 7. 1. 10.
Vide supra.

ing

Popham 121.
Kelynge 76.

ing their purpose, and also by stopping others whom he shall see coming to join them; for if private persons may do thus much, as it is most certain that they may, towards the suppressing of a common affray, surely *a fortiori* they may do it towards the suppressing of a riot: Also it hath been holden, That private persons may arm themselves in order to suppress a riot; from whence it seems clearly to follow, that they may also make use of arms in the suppressing of it, if there be a necessity for their so doing. However it seems to be extremely hazardous for private persons to proceed to those extremities; and it seems no way safe for them to go so far in common cases, lest under the pretence of keeping the peace, they cause a more enormous breach of it, and therefore such violent methods seem only proper against such riots as favour of rebellion, for the suppressing whereof no remedies can be too sharp or severe.—However it is enacted by 1 Geo. 1. c. 5.

A person present aiding and abetting rioters is a principal in the second degree, under this act of parliament. 4 Burr. 2073.

Vide Douglas, p. 700. n. (1) (2)

“ That if more persons than twelve being unlawfully, riotously and tumultuously assembled, twelve or more of them shall continue together, and not disperse themselves within one hour after proclamation made in pursuance of that statute, that then every peace officer of the place where such assembly shall be, and all persons who shall be commanded to be assisting to such officer, may and ought to apprehend all such rioters, and carry them before some justice of peace; and that if any such rioter shall happen to be killed, maimed, or hurt by reason of their resisting such officer, &c. the officer shall be discharged, &c.” But the statute being wholly in the affirmative, cannot be thought to take away any part of the authority in the suppressing of a riot, which was before that time given either to officers or private persons by the common law or by statute.

Crompton 61.
Dalt. c. 46.
C. Car. 507.

3 R. Abr. 203.

Sec. 12. Generally offences of this nature are punished at the common law, as trespasses, by fine and imprisonment only; yet sometimes, where they have been very enormous, they have been punished with the pillory; and anciently, if they were undertaken in contempt of the king's express prohibition of their meeting, under pain of forfeiture of lands, &c. they seem to have been punishable with such forfeiture.

21 Ed. 4. 13, 14.
Dalt. c. 88.
C. Car. 157.
2 Hale 155.

(4) Vide the King v. Kennet, Lord Mayor of London, during the riots in the year 1730.

Sec. 13. It hath been holden, That the persons of whom a corporation consists, being guilty of a riot, are punishable in their natural, but not in their politic capacity; for the corporation itself cannot be in fault, because it is invisible, and exists only in supposition of law. Yet there are some precedents by which it appears, that corporations have been amerced, (5) and their liberties seized into the king's hands, for suffering a dangerous riot to happen within their jurisdiction without using their endeavours to suppress it.

Sec. 7.

Sec. 14. Women are punishable as rioters, but infants under the age of discretion are not.

As to the third point, *viz.* How far offences of this nature may be suppressed and punished by statute; I shall consider, How far they may be suppressed and punished by one justice of peace. And, How far by two or more.

Sec. 15. As to the first of these points, it is enacted by 34 Edw. 3. c. 1. "That justices of peace shall have power to restrain offenders, rioters, and all barrators; and to pursue, arrest, take and chastise them according to their trespasss and offence; and to cause them to be imprisoned, and duly punished, &c."

Sec. 16. And this statute has been liberally construed for the advancement of justice; for it hath been resolved, That if a justice of peace find persons riotously assembled, he alone without staying for his companions hath not only power to arrest the offenders, and bind them to their good behaviour, or imprison them if they do not offer good bail, but that he may also authorise others to arrest them by a bare parol command without other warrant, and that by force thereof the persons so commanded, may pursue and arrest the offenders in his absence as well as presence. It is also said, That if a justice of peace be sick, and hear that persons are riotously assembled, he may send his servants to arrest them and bring them before him; and that if he hear that persons are riotously together in a certain place, and go thither and find none there, he may leave his servants behind him with a command to arrest them, when they shall come. Also it is said, That after a riot is over, any one justice of peace may send his warrant to arrest any person who was concerned in it, and also that he may send him to gaol, till he shall find sureties for his good behaviour.

14 H. 7. 9.

Lamb. 181, &c.

Dalt. c. 45.

B. Peace. 7.

Pulton 28.

Crom. 62, 63,

64, 65, 193.

Kellwood 41.

Sec. 17. But it seems to be agreed, that no one (a) justice of the peace hath any power by force of this statute, either to record a riot upon his own view, or to take an inquisition thereof after it is over. Also if one justice of peace proceeding upon this statute, shall arrest an innocent person as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing of himself, because no single justice of peace is by this statute made a judge of the said offence. (b) But if a riot shall be committed by persons armed in an unusual manner, contrary to the statute of Northampton, and any one justice of peace acting *ex officio*, in pursuance of the said statute, seize the armour and imprison the offender, and make a record of the whole matter, such a record cannot be traversed, because it is made by one acting in a judicial capacity, as appears more at large in the chapter

(a) B. Peace, 9.

Kellw. 41.

Lamb. 181, &c.

Pulton 26.

Summary 139.

Crom. 61, 63,

65.

Dalt. c. 46.

Con. B. Judges

10.

(b) 8 Co. 121.

Dalt. c. 22, 46.

of affrays; and for the same reason, if a justice of peace proceeding on the statute of 15 Rich. 2. against forcible entries and detainers, shall upon his own view record a riot, which shall be committed in the making of any such forcible entry or detainer, a riot so recorded cannot be traversed, as hath been shewn in the foregoing chapter. Also if a justice of peace acting as a judge, by virtue of any statute whatsoever empowering him so to do, make a record upon his view of a riot committed in his presence, such record shall not be traversed; for the law gives such an uncontrollable credit to all matters of record, made by any judge of record as such, that it will never admit of an averment against the truth thereof.

Crompton 65.
Lambard 317.
Vide inf. l. 25.

Fult. 25, 26.
Lambard 314.
Crompton 62.

Sec. 18. It hath been questioned, Whether a justice of peace be authorized by virtue of the above-mentioned statute of 34 Edw. 3. c. 1. to raise the power of the county to suppress a riot; but it seemeth, That by being made a conservator of the peace, he hath by an implication of law, all such powers in relation thereto, as are incident to the office of a conservator of the peace by the common law; and consequently, That he hath a right of demanding the assistance of others to enable him to preserve the peace in the same manner, as every sheriff and constable are empowered to demand such assistance by the common law; However there seems to be no reason to doubt, but that every justice of peace is authorized by 17 Rich. 2. c. 8. to raise the power of the county to repress a riot; for by the said statute it is enacted, "That as soon as the sheriffs, and other the king's ministers," under which words all justices of peace seem clearly to be included, "shall hear of a riot, rout, or other assembly against the peace, they with the power of the county where such case shall happen, shall disturb such malice with all their power, and shall apprehend all such offenders, and put them in prison, until due execution of the law be made of them; and that the lords and other liege people of the realm shall attend, with their whole strength and power, the sheriffs and ministers aforesaid."

3 H. 7. 10.
3 Inst. 138.
Vide *supra*.

Sec. 19. As to the second point, viz. How far offences of this nature may be suppressed and punished by two or more justices of peace; it is enacted by 13 Hen. 4. c. 7. "That if any riot, assembly, or rout of people against the law, be made in parties of the realm; that the justices of peace, three or two of them at the least, and the sheriff or under-sheriff of the county where such riot, assembly or rout, shall be made hereafter, shall come with the power of the county (if need be) to arrest them, and shall arrest them, and the same justices and sheriff, or under-sheriff, shall have power to record that which they shall find so done in their presence against the law. And that by the record of the same justices and sheriff, or under-sheriff, such trespassers
" and

“ and offenders shall be convict in the manner and form as is
“ contained in the statute of forcible entries.”

Sett. 20. In the construction this statute, compared with the above-mentioned statute of 17 Rich. 2. c. 8. and also with the statute of 2 Hen. 5. c. 8. it hath been holden, That all persons whatsoever, and even noblemen, and all others of what condition or degree soever they may be, except women, clergymen, persons decrepit, and infants under the age of fifteen years, are bound under pain of fine and imprisonment, upon reasonable warning to attend the justices and sheriffs in the execution of the said statute, and not only to arrest the rioters, but also to conduct them to prison.

Pulton 29.
Dalt. c. 46.
Crom. 63.
Lamb. 116, 315.

Sett. 21. Also it hath been holden, That those who attend the justices in order to suppress a riot, may take with them such weapons as shall be necessary to enable them effectually to do it, and that they may justify the beating, wounding, and even the killing of such rioters as shall resist, or refuse to surrender themselves.

Pop. 120, 121.
Crompton 62.
Dalton c. 46.
Lambard 316.

Sett. 22. It is said, That the justices of peace are not only empowered by the said statute, to raise the power of the county to assist them, in suppressing a riot which shall happen within their own view or hearing, but also, that they may safely do it upon a credible information given them of a notorious riot happening at a distance, whether there were any such riot in truth or not; for it may be dangerous for them to stay till they can get certain information of the fact: But they seem to be punishable for alarming the country in this manner, without some such probable ground of their proceeding, as would induce a reasonable man to think it necessary and convenient.

Lamb. 315,
316, 318, 319.
Dalt. c. 46.
Pulton 29.
Crom. 64.

Sett. 23. It seems clear from the said statute, That if the justices, &c. in going towards the place where they have heard that there is a riot, shall meet persons coming from thence riotously arrayed, they may arrest them for being assembled together in such an unlawful manner, and also make a record thereof, &c. for the statute extends to all other unlawful assemblies whatsoever, as well as to riots.

Dalt. c. 46.
Lamb. 316.
Crom. 63.

Sett. 24. Also it seems clear, That after the justices have had a view of a riot they may make a record thereof, whether the offenders be in custody at the same time, or have escaped: And it is said that the justices may lawfully, upon a fresh pursuit, arrest such of the offenders as shall have escaped, but that they cannot at another time award any process on such a record, and therefore that they ought to send it into King's Bench, if any of the offenders escape from a fresh pursuit, and that process shall issue against them from thence: However there seems to be no doubt, but that any of the same justices who have recorded a riot, or any other justice of peace, may at any time by virtue

Lamb. 318,
Dalt. c. 46.
Pulton 29.
8 Co. 121.

Vide inf. c. 29.
Vide sup. c. 116.

of the abovementioned statute of 34 Edw. 3. c. 1. arrest those who have been notoriously guilty of a riot, in order to compel them to find sureties for their good behaviour.

Raymond 386.
Crom. 65. 63.
Dalton c. 46.

Fulton 29.
Lamb. 316, 317.

Sec. 25. It seemeth to be certain, That the record of a riot expressly mentioned to have happened within the view of the justices by whom it is recorded, is a conviction of so great authority, that it can no way be traversed, however little ground in truth there might be to affirm that any riot at all was committed, or however innocent the parties may be of the fact recorded against them. And it is said, That if any one be bound by recognizance to keep the peace, and on a *scire facias* thereon such a record of a riot be produced against him, he shall not only be concluded thereby from pleading the general issue, but also from pleading any matter of justification whatsoever.

Lambard 317.
Dalton c. 130.

Sec. 26. However it seemeth clear, That if in such a record of a riot it be contained, that the party was guilty therein of a felony, or maim, or rescous, the party shall be concluded thereby as to the riot only, and not as to any of the other matters, because the justices of peace, have by this statute, a judicial authority over no other offences except riots, routs, and unlawful assemblies.

Lambard 316.
Dalton c. 46.

Lambard 319.
Raymond 386.
Con. Dalton c. 46.

Sec. 27. And inasmuch as such a record is a final conviction of the parties as to all such matters as are properly contained in it, it ought to be certain both as to the time and place of the offence, and the number of persons concerned therein, and the several kinds of weapons made use of by them, and all other circumstances of the fact; for since the parties are concluded from denying the truth of such a record, and have no other remedy to defend themselves against it, but only by taking advantage of the insufficiency of what is contained in it, they may justly demand the benefit of excepting to it, if it do not expressly shew, both that they are guilty within the meaning of the statute; and also how far they are guilty, and that the justices have pursued the power given them by the said statute, and from the same ground it seems also to follow, That such a record may be excepted against, if it do not appear to have been made by the sheriff or under-sheriff in concurrence with the justices.

Lambard 317.
Dalton c. 46.

Sec. 28. It is said that the offenders being under the arrest of the said justices, and also convicted by a record of their offence, ought immediately to be committed to gaol by the same justices, till they shall make fine and ransom to the king, which can be assessed by no other justices of peace, except those by whom the record of the offence was made, and by 2 Hen. 5. c. 8. such fine ought to be larger than it was wont to be before that statute, for the support of the charges of the said justices, &c. whereof payment ought to be

be made by the sheriff, by indenture thereof between him and them.

Sec. 29. It is farther enacted by the said statute of 13 Hen. 4. c. 7. that if it shall happen, " That such trespassers and offenders be departed before the coming of the said justices and sheriff, and under-sheriff, that the same justices, three, or two of them shall diligently inquire within a month after such riot, assembly, or rout of people so made, and thereof shall hear and determine according to the law of the land."

Sec. 30. Also it is farther enacted by 19 Hen. 7. c. 13. " That the sheriff having a precept directed to him to return a jury in pursuance of 13 Hen. 4. c. 7. shall return twenty-four persons dwelling within the shire where such riot, rout, or unlawful assembly shall be so committed and done, whereof every of them shall have lands and tenements within the same shire, to the yearly value of twenty shillings of charter-land or freehold, or twenty-six shillings and eight-pence of copyhold, or of both, over and above all charges, for to enquire of the said riot, rout, or unlawful assembly. And that he shall return upon every person so by him impanelled, in issues at the first day twenty shillings, and at the second day forty shillings, if they appear not, and be sworn to inquire of the premisses at the first day. And that the sheriff for every default, &c. shall forfeit twenty pounds, &c."

Sec. 31. It is not clearly settled, whether the month, within which the justices of peace are confined to take their inquiry by force of these statutes, must be reckoned according to the computation of a lunar, or solar month; however, it seems to be agreed, That if the justices give their charge to the jury, and it is said, that if they do but award a precept for the returning of the jury, within a lunar month, they may take the verdict afterwards, for the cause being regularly attached in them within the time prescribed by the statute, shall be prosecuted as all other cases ought, with such convenient dispatch as to the judges thereof shall seem proper; and the statute, by obliging the justices to make so speedy an enquiry, meant not to hurry them in the execution of it.

1 Sid. 186.
1 Keb. 695.
Vide supra.
Lamb. 322.
Dalt. c. 46.
Pulton 29.
6 Mod. 141.
Salkeld 593.

Sec. 32. It is generally said, That any justice of the county may take such an enquiry, whether they dwell near the place where the riot happened, or at a distance, or whether they went to view the riot or not; for the statute ought to be construed as largely as the words will bear, in favour of the justices power in the suppressing of such riots; and therefore those words in the statute, that the same justices, &c.

Lomb. 322, 327.
Dalt. c. 46.
Pulton 29.
Crompt. 62, 63,
seems contrary.

shall

See Sect. 44.

shall enquire, ought to be thus expounded, That the same justices who were before empowered to raise the *posse*, &c. shall inquire; and it is clear, That any justices in the county are within that part of the statute which gives that power; neither is it any way reasonable to construe the last clause of the said statute, whereby the justices who who dwell nighest, are bound to execute the statute under pain of one hundred pounds, in such a manner as to restrain the jurisdiction of those who by the foregoing part of the said statute are authorised to execute it; for if such an exposition should prevail, the negligence of the justices who happen to dwell nighest would make the statute wholly ineffectual.

Lambard 347.
Raymond 386.
Salkeld 593.
Carthew 383.

Sect. 33. It seems clear from the wording of the above-mentioned clause, that the sheriff ought not to join with the justices in taking of such an inquiry, as he ought to do in making a record of a riot upon view.

Lamb. 323, 328.
Dalt. c. 46, &
c. 132.
Pulton 26
Crompton 67.

Sect. 34. Also it seems clear from these words in the statute of 13 Hen. 4. c. 7. "That the same justices shall hear and determine, &c." that they may award process under their own *teste*, against those who shall be indicted before them of any of the offences above-mentioned, according to the form of the said statute; and also that they may award the like process for the trial of a traverse of such an inquisition, and do all other things in relation thereunto, which are of course incident to all courts of record.

Dalt. c. 46.
Crompton 61.

Sect. 35. But it hath been questioned, whether the justices can safely dismiss the offenders upon their paying such a fine as shall be imposed upon them, without some judgment for their imprisonment as well as fine, inasmuch as the statute of 2 Hen. 5. c. 8. is express, That all rioters attainted of great and heinous riots shall have one whole year's imprisonment at the least, without bail, &c. and that rioters attainted of petit riots, shall have imprisonment, as best shall seem to the king or to his council.

Crompton 63.
Pulton. 24.
Dalton c. 46.
See 1 Leon. 282.

Sect. 36. Formerly, if the fine imposed upon rioters by justices of peace had been too favourable, it was a common practice for the court of Star-chamber afterwards to impose such other fine as might, together with that which was assessed by the justices of peace, be proportionable to the heinousness of the offence; and this was said not to be a double punishment for the same offence, but only an award of due penalty at several times.

Sect. 37. It is farther enacted by the said statute of 13 Hen. 4. c. 7. "That if the truth cannot be found in the manner as is aforesaid, then within a month then next following, the justices, three, or two of them, and the sheriff, or under-sheriff, shall certify before the king and

“ his council all the deed and the circumstances thereof :
 “ which certificate shall be of like force as the presentment
 “ of twelve men ; upon which certificate he said trespassers
 “ and offenders shall be put to answer, and they which shall
 “ be found guilty, shall be punished according to the discre-
 “ tion of the king and his council. And if such trespassers
 “ and offenders do traverse the matter so certified, the same
 “ certificate and traverse shall be sent into the King’s Bench,
 “ there to be tried and determined, as the law require h ; and
 “ if they appear not before the king and his council, or in
 “ the King’s Bench, upon such process and proclamation for
 “ their appearance as are required by the said statute, they
 “ shall be attainted of the riot, &c.”

Stat. 38. And it is farther enacted by 19 Hen. 7. c. 13.
 “ That if a riot, &c. be not found by the jury by reason of
 “ any maintenance or embracery of the jurors, then the same
 “ justices, &c. over and above such certificate which they must
 “ and are bound to make by the said statute of 13 Hen. 4.
 “ c. 7. shall in the same certificate certify the names and
 “ misdemeanors of such maintainers, &c. on pain that every
 “ of the said justices, &c. shall forfeit twenty pounds, if they
 “ have no reasonable excuse for not certifying the same ; which
 “ certificate so made shall be of like force as if the matter
 “ were found by verdict of twelve men ; and every person
 “ duly proved to be such a maintainer, &c. shall forfeit
 “ twenty pounds, &c.”

Stat. 39. In the construction of these statutes it hath been
 holden, That the certificate required by the above mentioned
 statutes may be made, either by the justices, &c. who went to
 see the riot, or by those who took the inquiry ; but it seems to
 be most proper, That wherever such an inquisition is taken,
 such certificate should be made by such justices who made the
 inquiry, because they having had the examination of the fact,
 must needs be best able to judge of the circumstances thereof,
 and in that respect are the most proper persons to supply the
 defects of the inquiry : However, the said statute of 19 Hen. 7.
 c. 13. which is grafted on 13 Hen. 4. c. 7. seems clearly to
 imply, That some justices are bound in a more especial man-
 ner to make such certificate than any others, by imposing the
 penalty of twenty pounds on those who neglect to make it as
 they are bound by 13 Hen. 4. c. 7. which part of the statute
 seems to be most reasonably applied to those justices who took
 the inquiry, or in case that no inquiry was taken, to those
 justices who endeavoured to take one, but by the fault of
 others were hindred from taking it ; so there was no need of
 such an additional penalty on the neighbouring justices who
 were bound before to do their duty in executing 13 Hen. 4. c. 7.

Lamb. 323, 326.
 Pulton 29.
 Dalton c. 46.

under pain of forfeiting one hundred pounds, as will be shewn, section forty four, &c.

Pulton 29.
Lambard 324.
Dalton c. 46.

Sec. 40. Also it is generally said, That such a certificate must be made within a month after the inquiry; and this seems to be a very reasonable construction where an inquiry has actually been made; but it may happen that no inquiry at all may be taken, either through the default of the sheriff in not returning a jury, or the obstinacy of the jurors in refusing to appear, or the rebellious humour of the people in not suffering the justices to do their duty; in all which cases a certificate seems to be required, both by the intent and letter of the statute, the words whereof as to this purpose are, "If the truth cannot be found in the manner as is aforesaid, then within a month then next following, the justices, &c. shall certify, &c.". And therefore in these cases it seems proper to make a certificate of the obstructions, which prevented the taking of such an inquiry, within a month after they happen.

Lambard 324.
Con.Cromp. 63.
Dalt. c. 46. &
103.
B. Præm. 1.

Sec. 41. It seemeth clear from the plain words of the statute, That the certificate ought to be made to the privy council board, which is clearly distinguished, both from the Chancery, and also from the King's Bench, which in some statutes relating to judicial proceedings, are taken for the king's council.

Pulton 29.
Crompton 63.
Lamb. 325, 326.
Dalton c. 46.

Sec. 42. It is said, That if there be variance between the inquisition and certificate, that shall be taken which is most for the king's advantage; and therefore if the inquisition be of a riot by ten persons, and the certificate of a riot by twenty, or by ten in harness; or of a battery joined with a riot; that the certificate shall be preferred, because the fine to the king shall be the greater; but if they differ only as to the time, it is said that the inquisition shall be preferred.

Dalton c. 46.
& c. 130.
Lamb. 321, 322.

Sec. 43. Also it seemeth certain, That such a certificate, being in nature of an indictment at common law, ought to comprehend the certainty of time, place, and persons, and other material circumstances, both of the riots and maintenance, &c. but perhaps it need not express the additions of the offenders.

Sec. 44. It is farther enacted by the said statute of 13 Hen. 4. c. 7. "That the justices of peace dwelling nextest in every county where such riot, assembly, or rout of people shall be made hereafter, together with the sheriff or under-sheriff of the same county, and also the justices of assizes, for the time that they shall be there in their session, in case that any such riot, assembly, or rout be made in their presence, shall do execution

execution of this statute, every one upon pain of one hundred pounds, to be paid to the king as often as they shall be found in default of the execution of the same statute."

Sec. 45. In the construction of this clause the following opinions have been holden: First, That no justice of peace is in danger of incurring the penalty thereof, unless he dwell in the county wherein a riot happens. Lambard 236.
Crompton 63.
Dalton c. 46.

Sec. 46. Secondly, That if any justices of peace, who do not dwell nearest to the place, do actually execute the statute, they excuse all the rest. Dalton c. 46.
Lambard 326
Crompton 63.

Sec. 47. Thirdly, That if the justices whose dwelling was nearest at the time of the riot, or one of them, happen to die within the month, those whose dwelling is thereby become the nearest are bound to execute the statute in the same manner as the others were. Pulton 30.
Crompton 62.

Sec. 48. Fourthly, That notwithstanding those justices only, who dwell nearest, are liable to the penalty of the statute, yet if any others on notice neglect to supply their default, they are finable at discretion. Lambard 327.
Dalton c. 46.
Pulton 30.

Sec. 49. Fifthly, That if the two justices, or one of them, do their duty in executing, or endeavouring to execute the statute, they shall not incur any penalty through a default of the sheriff, &c. either in refusing to appear, or to return a jury, &c. Crompton 63.
Lambard 327.
Dalton c. 46.
Pulton 30.

Sec. 50. Sixthly, That the said justices, &c. shall not avoid the penalty by executing the statute in part only, as by recording a riot without committing the parties. Crompton 61.

Sec. 51. Seventhly, That no justice, &c. is subject to the penalty of the said statute on account of a petit riot, but only of such as are notorious, and in nature of insurrections and rebellions. Dalton. c. 46.

Sec. 52. Eighthly, That if a justice of peace, &c. had no express notice given him of the riot, he shall be excused, unless it were so very flagrant, that by common intendment, every one dwelling near it could not but have notice thereof. Dyer 210.
Lambard 328.
Pulton 28.
Crompton 62.
Dalton c. 46.

Sec. 53. Ninthly, That the acquiescence or agreement of the parties aggrieved is no excuse to the justices, because they ought, *ex officio*, to make the inquiry, and make proclamation whether any will give evidence for the king, &c. and may bind such of the parties grieved, as shall refuse to prosecute their complaint, to their good behaviour. Crompton 62.
Lambard 322.
Pulton 28.
Dalton c. 46.
Crompton 64.

Sec. 54. Also it is farther enacted by 2 Hen. 5. c. 8. "That upon any default of the said justices, &c. touching the execution of 13 Hen. 4. a commission shall be awarded at the instance of the party grieved, to enquire as well of the truth of the case, as of the default of the said justices, &c. and that the said commissioners shall presently return into Chancery the inquests before them taken; and that the jurors, who shall make inquiry, shall be worth 10l. *per annum*, and shall be returned by the coroners, if the sheriff, supposed to be in default, continue in his office, &c." See the statute.

Sec. 55. And it is farther enacted by 2 Hen. 5. c. 9. and 8 Hen. 6. c. 14. "That the lord chancellor, upon complaint made to him, that a dangerous rioter is fled into places unknown, and also upon a suggestion under the seals of two justices of peace and the sheriff, that the common fame and voice runneth in the county of the riot, may award a *capias* against the party, returnable in Chancery, upon a certain day, &c. and afterwards a *writ of proclamation* returnable in the King's Bench, &c."

Sec. 56. But all the penalties of the above-mentioned statutes having been found by experience not to be sufficient to restrain the rage of the populace from breaking out into dangerous tumults, whenever they happen to be persuaded that they lie under any real or pretended grievance, it was thought necessary to make a farther provision against such insolent disturbances of the peace, by more severe laws; and to this end it was enacted by 1 Geo. 1. c. 5.— "That if any persons to the number of twelve, (5) or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any justice of peace, sheriff of the county, or under-sheriff, or by the mayor, bailiff or bailiffs, or other head-officer or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, under the pains of the said statute, shall afterwards unlawfully, riotously, and tumultuously continue together by the space of one hour after such proclamation made, or after a wilful let or hindrance of a justice of peace, &c. from making the same proclamation, shall be adjudged felons without benefit of clergy, &c."

4 Burr. 2073.
(5) It is not perfectly clear from the penning of the act, whether it is necessary that there should have been twelve or more rioters in order to entitle the party injured to his action against the hundred. (Vide sect. 59.) But, according to the most obvious construction, that number is not necessary to constitute the felony created by section 4. Douglas 709.

Sec. 57. And it is farther enacted by the said statute, "That if any person or persons, shall with force and arms
" wilfully

“ wilfully and knowingly oppose, obstruct, or in any manner
 “ wilfully and knowingly let, hinder, or hurt any person, &c.
 “ who shall begin to proclaim, or go to proclaim, according
 “ to the proclamation appointed by the said statute, whereby
 “ such proclamation shall not be made, they shall be adjudged
 “ felons without benefit of clergy.”

Stat. 58. And it is farther enacted by the said statute,
 “ That if any persons unlawfully, riotously and tumultuously
 “ assembled together, to the disturbance of the public peace,
 “ shall unlawfully and with force demolish or pull down, or
 “ begin to demolish or pull down any church or chapel, or
 “ any building for religious worship, certified and registered
 “ according to 1 Will. & Mar. c. 18.” which is commonly
 “ called The Toleration Act, “ or any dwelling-house, barn,
 “ stable, or other out-house, they shall be adjudged felons with-
 “ out benefit of clergy.”

N. B. Vide the trials of the rioters in the year 1780.

Stat. 59. And it is farther enacted by the said statute, Vide Cowper
 “ That whenever any such church, &c. shall be demolished, 485.
 “ &c. by any such rioters, &c. the inhabitants of the
 “ town or hundred wherein the riot happened, shall be
 “ bound to make good the damage, &c.”

† *Stat.* 60. And it is recited by 9 Geo. 3. c. 29. “ That
 “ whereas some doubts have arisen whether the said act of 1 Geo. For the riotous
 “ 1. s. 2. c. 5. extends to the pulling down and demolishing destruction of
 “ of mills,” thereupon it is enacted, “ That if any person or fences, trees,
 “ persons, unlawfully, riotously, and tumultuously assembled &c. vide 6 Geo.
 “ together, to the disturbance of the public peace, shall un- 1. c. 16. ante.
 “ lawfully, and with force demolish, or pull down, or begin p. 215.
 “ to demolish or pull down any wind saw-mill, or other wind-
 “ mill, or any water-mill, or other mill, which shall have been
 “ or shall be erected, or any of the works thereto respectively
 “ belonging; such offender shall suffer death without clergy;”
 provided the prosecution be commenced within eighteen
 months after the offence committed.

† *Stat.* 61. It is enacted by 13 Car. 2. c. 5. “ That no
 “ person or persons whatsoever, shall solicit, labour, or pro- Noy 101.
 “ cure, the getting of hands, or other consent of any per- 2 Croke 37.
 “ sons above the number of twenty, to any petition, com- Moor 755.
 “ plaint, remonstrance, declaration, or other address to the 4 Comm. 147.
 “ king, or both, or either houses of parliament, for altera-
 “ tion of matters established by law in church or state,
 “ unless the matter thereof have been first consented unto, and
 “ ordered by three or more justices of that county, or by the
 “ major part of the grand jury of the county, or division
 “ of

“ of the county, where the same matter shall arise at their public assizes, or general quarter sessions, or if arising in London, by the lord mayor, aldermen, and common council assembled; and that no person or persons whatsoever, shall repair to his majesty, or both, or either the houses of parliament upon pretence of delivering any petition, complaint, remonstrance, or declaration, or other addresses accompanied with excessive number of people, nor at any one time with above the number of ten people upon pain of incurring a penalty not exceeding one hundred pounds and three months imprisonment, on conviction, by two witnesses, within six months, at the King's Bench assizes, or quarter sessions. But this act shall not prevent the presentation of any public or private grievance, to any member of parliament, by any number not exceeding twenty, or to the king, for any remedy to be had thereupon.” (6)

(6) N. B. By 1 Will. and Mary, sess. 2. c. 2. s. 1. article 5, usually styled the Bill of Rights, it is enacted, “ That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are illegal.” On the trial of Lord George Gordon, it was contended that this article had virtually repealed the above statute of Charles; but Lord Mansfield declared it was the unanimous opinion of the court, that neither that, nor any other act of parliament had repealed it; and that it was in full force. Douglas 592, 593.

CHAPTER THE SIXTY-SIXTH.

OF OFFENCES BY OFFICERS IN GENERAL.

OFFENCES under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace, are either; Such as are committed by officers; Or, Such as are committed by common persons without any relation to an office.

Offences by officers seems reducible to the following heads; First, Neglect, or breach of duty. Secondly, Bribery, Thirdly, Extortion.

Co. Lit. 233,
234-

Vide the case of the King v. Bambridge, Mich. term, 2; Geo. 3. or an information for misfeasance, as account-ant at the pay-office, Whitehall

Sec. 1. As to the first of these offences, I take it to be agreed, That in the grant of every office whatsoever, there is this condition implied by common reason, that the grantee ought to execute it diligently and faithfully: For since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just, than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it.

And

And therefore it is certain, That an officer is liable to a forfeiture of his office, not only for doing a thing directly contrary to the design of it, but also for neglecting to attend his duty at all usual, proper, and convenient times and places, whereby any damage shall accrue to those, by or for whom he was made an officer. And some have gone so far as to hold, That an office concerning the administration of justice, or the common-wealth, shall be forfeited for a bare non-user, whether any special damage be occasioned thereby or not: But this opinion doth not appear to be warranted by any resolution in point, and the (a) authorities which are cited to maintain it, do not seem to come up to it. However it cannot but be very reasonable, That he who so far neglects a publick office, as plainly to appear to take no manner of care of it, should rather be immediately displaced, than the publick be in danger of suffering that damage, which cannot but be expected some time or other from his negligence.

Sett. 2. But it would be endless to enumerate all the particular instances, wherein an officer may be discharged or fined; and it also seems needless to endeavour it, because they are generally so obvious to common sense, as to need no explication; for what can be more plain, than that a gaoler deserves to be discharged and fined, for (b) voluntarily suffering his prisoners to escape, or for (c) barbarously mistreating them? What can be more evident, than that a (d) sheriff is justly punishable for persuading a jury to underprize goods in the execution of a *feri facias*, &c. And therefore I shall leave the particular cases of this nature to every man's own judgment, which from the consideration of the general rules above-mentioned, and the various circumstances of every case, will easily discern how far each offence of this kind deserves to be punished.

9 Co. 50.
Co. Lit. 239.
2 Roll. 1. 3. l. 10.
2 And. 119.
Hard. 130.
Modern 193.
1 Sid. 81.
C. Car. 491.
(a) 39 H. 6. 32.
20 Ed. 4. 5.
22 Aff. 54.
2 H. 7. 11.
Plowden 379.
L. Quin.
Ed. 4. 27.
11 Ed. 4. 30.

(b) 9 Co. 50.
(c) Raym. 216.
(d) C. Jac. 426.

See 4 Comyns
digest tit. of
ficer.

CHAPTER THE SIXTY-SEVENTH.

OF BRIBERY.

IN treating of bribery, I shall consider, What it is. And How it is punishable.

Sett. 1. And first, Bribery in a strict sense is taken for a great misprision of one in a judicial place, taking any valuable thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for

3 Inst. 145.

X 4

doing

doing his office, or by colour of his office, but of the king only.

3 Inst. 149.

Hobart 9.

C. Jac. 65.

1 Levinz 40.

3 Modern 26.

2 Saikeld 605.

11 Modern 193.

Sett. 2. But bribery in a large sense is sometimes taken for the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of publick justice in order to incline him to do a thing against the known rules of honesty and integrity; for the law abhors any the least tendency to corruption in those who are any way concerned in its administration, and will not endure their taking a reward for the doing a thing which deserves the severest of punishments. (1)

(1) Therefore, to bribe persons, either by giving money, or promises to vote at elections of members of corporations, which are erected for the sake of public government, is an offence for which an information will lie. 2 Ld. Ray. 1377. 1 Black. 383. But the court will grant an information for this offence very cautiously, since the additional penalties by statute. 1 Black. 386. *Infra.* sect. 7.

3 Inst. 148.

Sett. 3. Also bribery sometimes signifies the taking or giving of a reward for offices of a public nature; and surely nothing can be more palpably prejudicial to the good of the publick, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of not to those who are most able to execute them, but those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry and diligence have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expence they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectation.

Vide Noy 102.
Moor 781.

For which reasons, among many others, it is expressly enacted by 12 Rich. 2. c. 2. "That the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justice of the one bench and of the other, barons of the Exchequer, and all other that shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the king, shall be firmly sworn that they shall not ordain, name, or make any of the above-mentioned officers, for any gift, or brokerage, favour or affection, nor that none which sueth by himself, or by others, privily or openly,

“ openly, to be in any manner of office, shall be put in
 “ the same office, or in any other, but that they make all
 “ such officers and ministers, of the best and most lawful
 “ men, and sufficient to their estimation and knowledge.”

Also by 4 Hen. 4. c. 5. “ No sheriff shall let his baili-
 “ wick to farm to any man, for the time that he occupieth
 “ such office, &c.”

Also, it is enacted by 5 & 6 Edw. 6. c. 16. “ That if any
 “ person shall bargain or sell, or take any reward, or promise
 “ of any reward for any office, or the deputation of any office,
 “ any way concerning the king’s revenue, or the keeping of his
 “ castles, or the administration or execution of justice, (unless
 “ it be such an office as had been usually granted before the
 “ making of the said act by the justices of the King’s Bench
 “ or Common Pleas, or by justices of assize) that then every
 “ such person so bargaining or selling, or taking such reward,
 “ or promise, &c. shall not only forfeit his right to such office,
 “ or to the nomination thereof, but also every person who
 “ shall give any such reward or promise, &c. shall be adjudged
 “ a disabled person in law, to have or enjoy such office, &c.”

Vide Noy 102.
 Moor. 781.

Sec. 4. In the construction of this statute of 5 & 6 Edw. 6.
 the following points have been resolved: First, That the offices
 of chancellor, register, and commissary in ecclesiastical courts,
 are within the meaning of the statute, inasmuch as those courts,
 do not only determine matters which are brought before them,
 merely *pro salute animæ*, but also have the decision of disputes
 concerning the lawfulness of matrimony and legitimation of
 children, which touch the inheritance of the subjects, and
 also hold plea of legacies and tithes, &c. in which respects
 they are courts of justice; but it hath been adjudged, that no
 office in fee is within the statute.

C. Jac. 269.
 3 Inst. 148.
 Salkeld. 468.
 2 Levins 289.
 2 Ven. 137. 467.

Sec. 5. Secondly, That one, who makes a contract for
 an office contrary to the purport of the said statute, is so far
 disabled to hold the same, that he cannot at any time during
 his life be restored to a capacity of holding it by any grant
 or dispensation whatsoever.

2 Levinz 151.
 Hobart 75.
 Co. Lit. 234.
 C. Car. 361.
 C. Jac. 386.

Thirdly, That a bond by a deputy of an office to pay a
 certain sum at all events, is within the statute, and consequently
 totally void, though it also contain other conditions which,
 if they stood by themselves would be good; but not a bond
 to pay half the profits or a certain sum out of the profits of the
 office for a deputation.

Salk. 466, 468.
 6 Modern 234.
 3 Co. 32.
 C. Elis. 529,
 530.
 1 And. 107, 150.

Fourthly, That the statute extends not to offices in the
 Plantations.

Salkeld 411.
 Quere 2 Mo.

Sec. 1.

3 Inst. 145.
1 Hale 262.
1 Leon. 295.
C. Jac. 65.
1 Rush. Coll. 31.

Sect. 6. As to the second point, viz. How bribery is punishable; it is said, That at common law, bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason before the 25 Edw. 3. and at this day it is certainly a very high offence, and punishable, not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment, &c.

4 Inst. 148.

(2) This was the case of the Earl of Middlesex, who had been raised by Buckingham's interest from the rank of a London merchant, to be lord high treasurer of England, but having incurred the displeasure of his patron, the favourite vowed revenge, and employed all his credit with the commons to procure the impeachment of the treasurer; but the charges against him were neither numerous nor important, the whole measure very dissatisfactory to the king, and the fine was remitted upon the accession of Charles the first. Parl. Hist. vol. 6. p. 191.

Sect. 7. Also all the other above-mentioned kinds of bribery, taken in a large sense, seem to be punishable with fine and imprisonment, &c. And in the time of king James the First, the earl of M. lord high treasurer of England, being impeached by the commons for refusing to hear petitions referred to him by the king, till he had received great bribes, and for other such like misdemeanours was, by sentence of the lords, deprived of all his offices, and disabled to have any for the future, or to sit in the parliament, and was fined fifty thousand pounds, and imprisoned during the king's pleasure. (2)

the treasurer; but the charges against him were neither numerous nor important, the whole measure very dissatisfactory to the king, and the fine was remitted upon the accession of Charles the first. Parl. Hist. vol. 6. p. 191.

AN ATTEMPT to induce a man to advise the king, under the influence of a bribe, is criminal, though never carried into execution. 4 Burr. 2499. Offering money to a privy counsellor to procure the reversion of an office in the gift of the crown, has been adjudged a misdemeanour, and punishable by information. Rex v. Vaughan.

(3) But if it appears to be a void election, an action for this penalty is not maintainable. L. Ray. 904.

† *Sect. 8.* And it is enacted by 7 & 8 Will. 3. c. 7.
“ That all contracts, promises, bonds, and securities whatsoever, made or given to procure any return of any member to serve in parliament, or thing relating thereunto, shall be adjudged void; and that whoever makes or gives such contract, security, promise, or bond, or any gift or reward, to procure a false or double return, shall forfeit 300l. One third to the king; one third to the poor; one third to the informer; to be recovered by action or information.” (3)

3 Burr. 1 270.
1304.
1 Black. 351,
356, 524, 541.

† *Sect. 9.* And it is further enacted by 2 Geo. 2. c. 24.
“ That if any person having, or claiming a right to vote at any election for members of parliament, shall ask, receive, or take any money, or other reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election, or if any person by himself,

"himself, or any person employed by him, doth or shall by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons, to give his or their vote or votes, or to forbear (a) to give his or their votes in any such election, such offender shall for every offence, forfeit 500l. together with full costs of suit, by action or information at Westminster. And any person offending in any of the said cases, from and after judgment has been so obtained against him, or by summary action, or prosecution, or being any otherwise lawfully convicted thereof, shall be for ever disabled to vote in any election for members of parliament, or to hold, exercise, or enjoy any office, or franchise as a member of any city, borough, town corporate, or cinque port, as if he was dead."

(a) It is not necessary that the party should actually forbear in consequence of the procurement. 3 Will. 292.

Stat. 10. But it is further enacted, "That if such offender, within twelve months next after such election, discover any other offender so that he be thereupon convicted, such offender so discovering and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act. Provided the prosecutions be commenced within two years, which commencement shall be (by 9 Geo. 2. c. 38.) the actual arrest, summons, or service of process." (4)

(4) This statute does not take away the common law process by indictment, or information for bribery at elections for members of parliament. But, as the offender would be equally liable to the penalties of the statute, vide 1 Black. 524, the court will not grant an information until the two years are expired, 3 Burr. 1335, except in particular cases, founded on particular reasons. 3 Burr. 1340. And it seems as if the court would adjourn passing sentence on a conviction by indictment, on the defendant's entering into a recognisance to appear on the day when the time limited for bringing the *qui tam* action will expire, 3 Burr. 1359; but the court will not, after that time has elapsed, prolong the judgment on account of the defendant's having indicted one of the witnesses, upon whose testimony he was convicted, because being so much interested he could not be admitted a witness. 3 Burr. 1388. 1 Black. 404. Nor will they stay the judgment on the *posse* in an action for this injury, on affidavits that the defendant is a discoverer. 3 Wilson 35. Nor will they grant a new trial, because a witness was *particeps criminis*. Sayer 290. But they will grant a new trial, if upon a special case, the jury have not found who was the first discoverer, although they find that the defendant produced a judgment by which it appeared that he had obtained a verdict against a third person upon this act; for it does not follow conclusively, that the person who obtains the verdict is necessarily the discoverer. 4 Burr. 2504, 2469. And it has been determined, that the person who makes an affidavit of the fact upon which another obtains a verdict, is the true discoverer. 4 Burr. 2286. And although a verdict is not a conviction until it be completed by a judgment, yet, after it is so completed, which the court will grant leave to do, it will relate back to the time of the original discovery. Ibid. 1 Black. 665. Vide also the Cricklade case, one volume, octavo, published by E. Brooke, 1785. Also 22 Geo. 3. c. 31.

If the elector is bribed by a friend of the candidate's, and exchanges a note to insure the vote, it is bribery within the act, although the elector voted for the opposite party. 3 Burr. 1235. 1 Black. 317. And so also is laying a wager with the voter that he does not vote for a particular candidate. Loft. 552. vide also Allen v. Hume, Mich. 26 Geo. 3. And by giving the elector money, he admits his right to vote, and shall not be permitted afterwards to controvert it. 3 Burr. 1580. Nor is it necessary that the candidate should have declared himself at the time the bribe was given, because asking a vote for him, under the title of the candidate's friend, makes him a candidate. Coomb v. Pitt, 5 Geo. 3. 1 Black. 523. Nor is it necessary that the person bribed should actually have a right

right to vote. 3 Wms. 35. But in an action the declaration must state *what* the defendant received or took as a reward, and whether money, or what particular species of reward, and not indefinitely and disjunctively, "that he took a gift or reward," and being upon a criminal charge, this defect is not helped by *verdict*, 4 Burr. 2471.

CHAPTER THE SIXTY-EIGHTH.

OF EXTORTION.

IN treating of Extortion, I shall consider, What shall be called Extortion; How it shall be punished.

Sec. As to the first point it is said, That extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

Co. Lit. 368.
10 Coke 102.
3 Inst. 149.
C. Car. 438,
448.
Hutton 53.
3 Inst. 68.
1 Ray. 149. 11 Mod. 80, 137. Salkeld 382.

Sec. 2. It is said, That at the common law, which was affirmed by the statute of Westminster, 1. c. 26. it was extortion for any sheriff or other minister of the king, whose office did any way concern the administration or execution of justice, or the common good of the subject, to take any reward whatsoever for doing his office, except what he received from the king. And surely this was a most excellent institution, highly tending to promote the honour of the king, and the ease of the people, and hath been always thought to conduce so much to the public good, that all prescriptions whatsoever which have been contrary to it, have been holden to be void; and upon this ground it hath been resolved, That the prescription, by virtue whereof the clerk of the market claimed certain fees for the view and examination of all weights and measures, &c. was merely void.

2 Inst. 209.
Co. Lit. 368.
42 Ed. 3, 4, 5.
2 R. Abr. 266.
Cro. Cir. 250.
4 Inst. 274.
Moor 523.
2 Inst. 209.

Sec. 3. But it hath been holden, That the fee of twenty pence, commonly called the bar-fee, which hath been taken, time out of mind, by the sheriff, of every prisoner who is acquitted, and also the fee of one penny, which was claimed by the coroner of every visne, when he came before the justices in Eyre, are not within the meaning of the statute, because they are not demanded by the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to them, whether they do any thing or not. But there seemeth to be no necessity for this distinction, for it cannot be intended to be the meaning of the statute to restrain

21 H. 7. 17.
2 Inst. 210.
2 Inst. 176.
2 P. C. 49.

strain the courts of justice in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers. For the chief danger of oppression is from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts which will not suffer them to be exceeded, without the highest repentment. (1)

(1) For the fees allowed to the several officers, vide 3 Com. Dig. 323, 324. 1 Modern 5. 11 Modern 89. *Ld. Ray.* 4. 103. 9 and 10 Will. 3. c. 41. 29 *Eliz.* c. 4. 3 *Jac.* 1. c. 7. 10 & 11 Will. 3. c. 23. f. 8. 3 *Geo.* 1. c. 15. 17 *Geo.* 3. c. 26. f. 6. *Cro. Cir.* 253.

Sec. 4. Also it having been found by experience, That generally it is vain to expect that any officers who depend upon a known fixed salary, without having any immediate benefit from any particular instances of their duty, should be so ready in undertaking, or diligent in executing them, as they would be, if they were to have a present advantage from them; it hath been thought expedient to permit them to take certain fees in many cases, but it is certain that they are guilty of extortion, if they take any thing more. Also it hath been resolved, That a promise to pay them money for the doing of a thing which the law will not suffer them to take any thing for, is merely void, however freely and voluntarily it may appear to have been made; for if once it should be allowed, That such promises could maintain an action, the people would quickly be given to understand how kindly they would be taken, and happy would that man be who could have his business well done without them. (2)

(2) It is extortion to oblige an executor to prove a will in the bishop's court, and to take fees thereon, knowing the same to have been proved in the prerogative court. *Strange* 73. Or in a sheriff's officer to admit a prisoner to bail, upon an agreement to receive a certain sum, when the prisoner should pay to a third person another sum of money. 2 *Burr.* 924. To arrest a man in order to obtain a release from him. 8 *Mod.* 189. In a gaoler to obtain money from his prisoner by any colourable means. 8 *Mod.* 226. *Str.* 575. Or in a church warden *colore officii*. 1 *Sid.* 307. In a miller, if he takes more for toll than is due by custom. *Ld. Ray.* 149. Or a commissary for absolution. 3 *Leo.* 268. Or a ferryman more for his ferry. 4 *Mod.* 101. Or to seize upon the place where a fair is held; and by building stalls, to force an exorbitant price for them. *Ld. Ray.* 150. Or in an under sheriff to refuse to execute process till his fees are paid. *Salk.* 330. Or to take a bond for his fee before execution is sued out. *Hutt.* 52. Or for a coroner to refuse his view until his fees be paid. 3 *Inst.* 149.

Sec. 5. As to the second point, viz. How extortion shall be punished; there is no doubt, but that at common law it is severely punishable at the king's suit, by fine and imprisonment; and also by a removal from the office, in the execution whereof it was committed. Also extortion in sheriffs, escheators, bailiffs, gaoler, the king's clerk of the market, and other inferior ministers and officers of the king, whose offices

do

21 *H.* 7. 17.
Co. Lit. 368.

3 *Inst.* 149.
2 *Inst.* 210.
Co. Lit. 368.
1 *R. Abr.* 6, 26,
41.
1 *Roll.* 313.
Noy 76.
1 *Jones* 65.
C. Eliz. 654.
Moor. 468, 523.
C. Jac. 103.

11 *Mod.* 82.
2 *R. Abr.* 32.
33, 75.
Raym. 315.
2 *Inst.* 209.
3 *Leo.* 268.
3 *Edw.* 1. c. 26.
1 *Strange* 74.

do any way concern the administration or execution of justice, or the common good of the subject, or for the king's service, hath a farther additional punishment by the above-mentioned statute of Westminster, by which it is enacted, "That no sheriff, nor other king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king, and that he who so doth, shall yield twice as much, and shall be punished at the king's pleasure." (3)

(3) And an action lies to recover the double value. 3 Com. Dig. 323. But the indictment which may be brought at the sessions, Str. 73, or information, must state the fact particularly. 3 Leo. 268. 25 Edw. 3. st. 3. c. 9. 11 Mod. 80. It must also specify the time when the offence was committed. 4 Mod. 101, 103. But although it be omitted to be stated for what the thing extorted was taken, yet it is good after verdict. Sid 91. And, in general, the King's Bench will oblige the party to demur to a defective indictment for extortion. 5 Mod. 13. And whatever may be the sum, if there is proof only of a shilling taken, the defendant is guilty; for the taking is the offence, and not the contract. L. Ray. 149. And he also who assists is equally guilty; for there are no accessaries in extortion. Str. 73. Extortion may be laid in any county, by the 31 Eliz. c. 5. See vide 2 Hawkins, ch. 26. f. 50.

CHAPTER THE SIXTY-NINTH.

OF PERJURY.

OFFENCES under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace, which may be committed by private persons, without any relation to an office; are either, Such as are infamous, and grossly scandalous, proceeding from principles of downright dishonesty, malice or faction. Or, Such as are of an inferior nature, and neither infamous, nor grossly scandalous.

Those of the first kind seem to be reducible to the following heads: Perjury, and subornation of perjury. Forgery. Cheats. Conspiracy. Keeping of a bawdy-house. And Libels.

And first of perjury, and subornation of perjury, of both which there are two kinds. First, By the common law. Secondly, By statute.

Com. Dig. tit.
Jus. of Peace.
B. 102.

PERJURY, by the common law, seemeth to be a wilful false oath, by one who being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.

For

For the better understanding whereof, I shall consider the following particulars:

First, How far this offence must be wilful. Secondly, In what kind of proceedings it may be committed. Thirdly, In what cases an oath may be said to be so far lawfully administered, that he who takes it may become guilty of perjury. Fourthly, In what kind of oaths perjury may be committed. Fifthly, How far the oath must be false. Sixthly, Whether the matter of the oath must be absolute. Seventhly, How far things sworn ought to be material to the point in question. Eighthly, How far the false oath must be credited.

Sett. 2. As to the first particular, *viz.* How far this offence must be wilful; it seemeth that no one ought to be found guilty thereof without clear proof, That the false oath alleged against him was taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable, That it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprize, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable.

Sett. 3. As to the second particular, *viz.* In what kind of proceedings this offence may be committed. It seems to be clearly agreed, That all such false oaths, as are taken before those who are any ways intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries; and it seems to have been holden by some, that all such false oaths as are taken before persons authorized by the king to examine witnesses in relation to any matter whatsoever, wherein his honour or interest are concerned, are also punishable as perjuries. And surely there can be no offence of this nature which will not justly deserve a public prosecution, inasmuch as if it should once prevail, it would make it impossible to have any law whatsoever duly executed, and expose the lives, liberties, and properties, of the most innocent, to the mercy of the greatest villains. And therefore it hath been holden, That not only such persons are indictable for perjury, who take a false oath in a court of record, upon an issue therein joined, but also all those who forswear themselves in a matter judicially depending before any court of (a) equity, or spiritual (b) court, or any other (c) lawful court, whether the proceedings therein be of record or not (d) or whether they concern the interest of the king

(a) C. Eliz. 185, 609. 2 Roll. 410. 1 R. Abr. 40. 1 Leon. 131. Con. Dy. 243. (c) 2 R. Abr. 257. 1 R. Abr. 41. Winch. 3. 5 Mod. 348. Hutt. 34. 1 Mod. 55. Yelv. 27. C. Eliz. 297, 342, 348, 905. (d) 12 Co. 101. C. Jac. 212. Con. C. Jac. 120. 3 Inst. 164. Vide *sett.* 18.

5 Mod. 350.
10 Mod. 195.
Salkeld 513.
3 Inst. 163.

C. Eliz. 168.
169.
Noy 128.
2 R. Abr. 257.
Hobart 62.

(a) C. Eliz. 907.
Skinner 327.
1 Sid. 418.
1 R. Abr. 40.
5 Mod. 348.

or subject. And it is said to be no way material, whether such false oath be taken in the face of a court, or persons authorized by it to examine a matter, the knowledge whereof, is necessary for the right determination of a cause; and (e) therefore, That a false oath before a sheriff, upon a writ of enquiry of damages, is as much punishable as if it were taken before the court on a trial of the cause.

(c) 1 R. Abr. 39.

Also it seemeth, That any false oath is punishable, as perjury, which tends to mislead the court in any of their proceedings relating to a matter judicially before them; though it no way affect the principal judgment which is to be given in the cause; as where a (f) person who offers himself to be bail for another knowingly, and wilfully swears that his substance is greater than it is. Also it hath been resolved, That not only such oaths as are taken upon judicial proceedings, but also all such as any way tend to abuse the administration of justice, are properly perjuries; as where one (g) takes a false oath before a justice of peace, in order to induce him to compel another to find sureties for the peace, &c. or where a person forswears himself (h) before commissioners appointed by the king to enquire of the forfeitures of his tenants estates, &c. whereby he makes them liable to be seized by exchequer process.—Also it hath been said, That a false oath is punishable as perjury, in some cases, wherein the king's honour or interest is concerned, though it do not concern the administration of justice; as where one swears a false oath concerning the possession of lands, before commissioners appointed by the king to inquire of such persons whose titles to the lands in their possession are defective, and want the supply of the king's patents: And this is certainly an offence of a very heinous nature, (i) tending not only to frustrate the king's gracious purpose, but to abuse his goodness by inducing him to grant his patents to those who are out of possession, and no way within the intent of the commission, which, instead of quieting the possessions of the subjects, cannot but end in the greatest disturbance of them.

(f) C. Car. 146.

(g) 2 Roll. 410.
2 R. Abr. 77.

(h) Noy 100,
Moor 627.

(i) Hobart 62.

However it seemeth certain, That no oath whatsoever in a mere private matter, howsoever wilful or malicious it may be, is punishable as perjury in a criminal prosecution; for private injuries are left to be redressed by private actions; and upon this ground it hath been holden, That a false oath taken by one upon the making of a bargain, that the thing sold is his own, is not punishable as perjury.—Also from what hath been said it appears, That the notion of perjury is confined to such public oaths only as affirm or deny some matter of fact, contrary to the knowledge of the party; and therefore, That it doth not extend to any promissory oaths whatsoever; from which it clearly

Con. 1 Ven. 369.
370.

3 R. Abr. 257.

clearly follows, That no officer publick or private, who neglects to execute his office in pursuance of his oath, or acts contrary to the purport of it, is indictable for perjury, in respect of such oath; yet it is certain, That his offence is highly aggravated by being contrary to his oath, and therefore, that he is liable to the severer fine on that account.

2 R. Abr. 257.
3 Inst. 166.

Sec. 4. As to the third particular, viz. In what cases an oath may be said to be so far lawfully administered, that he who takes it may become guilty of perjury by swearing falsely. It seemeth clear, That no oath whatsoever taken before (a) persons acting merely in a private (b) capacity, or (c) before those who take upon them to administer oaths of a publick nature, without legal authority for their so doing, or (d) before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even (e) before those who take upon them to administer justice by virtue of an authority seemingly colourable; but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle. (1)

(a) 2 R. Abr. 257.
3 Inst. 166.
Yelv. 72.
(b) Cro. El. 169.
(c) 1 Sid. 274.
2 R. Abr. 257.
Latch. 38, 132.
(d) Yelv. 111.
3 Inst. 166.
Sec. 4 Inst. 97.
29 Car. 2. 25.
2 Roll. 427.
4 Inst. 278.
(e) Sid. 148.
(1) *Qy.* If any magistrate is justifiable in taking a voluntary

affidavit in any extrajudicial matter. Vide 15 Geo. 3. c. 39. 3 Burn. 244.

And from the same ground it seemeth also clearly to follow, That no false oath in an affidavit, made before persons falsely pretending to be authorized by a court of justice to take affidavits in relation to matters depending before such court, can properly be called perjury, because no affidavit, is any way regarded, unless it be made before persons legally intrusted with a power to take it, as being both of sufficient ability to ask all proper questions of the party who shall make such affidavit, and also of such integrity as not to suffer any thing to be inserted therein, to the truth whereof the party hath not sworn. And though it may be said, That an affidavit taken before persons falsely pretending to be commissioned for such purpose by the courts of justice, doth directly tend to impose upon such courts, and may possibly happen through surprize to be read, and may also in its own nature be altogether heinous, as if it had been made before persons regularly impowered to take it; yet inasmuch as it is of itself of no manner of validity, and is no otherwise regarded, than as it hath the appearance of being sworn before persons legally commissioned, without which it would have no manner of credit, it seemeth that offences of this nature are most properly punished by severely chastising those who usurp such an authority of administering of oaths, without any legal warrant.

4 Comm. 157.
3 Inst. 165.

However, it hath been adjudged, That a false oath, taken before persons, who, having been commissioned to examine witnesses, happen to proceed after the demise of the king who gave them their commission, and before notice thereof may be punished as perjury; for it would be of the utmost ill consequence to make such proceedings void; and therefore though all such commissions be in strictness legally determined by the demise of the king, who gave them, without any notice; yet for the necessity of the case, whatever is done under them before such notice, must be suffered to stand good; for otherwise the most innocent and most deserving subjects would be unavoidably exposed to numberless prosecutions for doing their duties, without any colour of a fault. And *Quære*, Whether a perjury in a court whose proceedings are afterwards reversed by error, may not still be punished as perjury, notwithstanding such reversal. (2)

C. Car. 97, 98,
99.

1 Ven. 181.

(2) In the case of the King v. Alford, Summer assizes for Somerset, 1776; the defendant was indicted for perjury in a cause tried at the assizes before Mr. Justice Willes. The caption of the indictment recited the names of the judges who were in the commission, and charged, "That at the said trial, before the honourable Edward Willes *one of the justices aforesaid*, the defendant took his corporal oath, &c. He the said Edward Willes then and there *having competent authority to administer an oath* to the defendant in that behalf" the prisoner was found guilty. But Mr. Baron Eyre, who tried the cause, doubted of the authority of *one commissioner* to administer the oath; the record of *nisi prius*, which was read in evidence, stating, in the usual form, that the trial was before both the judges and therefore, Another doubt arose whether the evidence maintained the indictment. On reference, the first Hilary term, 1777, the judges were unanimous, that either of the judges may administer the oath; consequently there was no variance, and the conviction good. M.S.

SECT. 5. As to the fourth particular, *viz.* In what kind of oaths perjury may be committed. It seemeth clear, That a man may be in danger of being guilty thereof, not only in respect of a false oath, taken by him as a witness for another, but also in respect of a false oath taken by him in his own cause, either in an answer to questions put to him in a court of (a) law or (b) equity, having power to purge him upon oath concerning his knowledge of the matters in dispute, or in his (c) affidavit concerning some collateral matter, wherein the parties own oaths are allowed to be taken. But it seems; That a juror who gives a verdict contrary to manifest evidence, is not properly guilty of perjury within the above mentioned description, because he is not sworn to depose the truth, but only to give a true judgment upon the deposition of others, and in many cases is not punishable at all *in foro humano*, as shall be set forth more at large in the chapter of conspiracy.

(a) 1 R. Abr. 40.
83.
C. Eliz. 600.
(b) 1 Leon. 127.
C. Eliz. 155.
155.
1 R. Abr. 40.
69.
1 S. 244.
(c) 1 R. Abr. 79.
Noy 128.
5 Mod. 338.
Moor 656.
2 Kettle 452.
2 R. Abr. 77.

(d) Palm. 294.
Hesley 97.
2 R. Abr. 77.
3 Inst. 166.
Com. 3. Mod.
222.

SECT. 6. As to the fifth particular, *viz.* How far the matter of the oath which may amount to perjury, must be false. It (d) is said not to be material whether the fact which is sworn, be in itself true or false; for howsoever the thing sworn may happen to prove agreeable to the truth, yet if it

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were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears, That he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might make as well as he.

Sett. 7. As to the sixth particular, *viz.* How far the oath must be absolute. It is said, That no oath shall amount to perjury unless it be sworn absolutely and directly; and therefore, That he who swears a thing according as he thinks, remembers, or believes, cannot in respect of such an oath be found guilty of perjury. 3 Inst. 166.

Sett. 8. As to the seventh particular, *viz.* How far the thing sworn ought to be material to the point in question? It seemeth clear, That if the oath for which a man is indicted of perjury, be wholly foreign from that purpose, or altogether immaterial, and neither any way pertinent to the matter in question, not tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is merely idle and insignificant. As if upon a trial, in which the question is, whether such a one was *compos* or not, a witness introduces his evidence by giving a history of a journey which he took to see the party, and happens to swear falsely in relation to some of the circumstances of the journey. Also it hath been adjudged, That where a witness being asked by a judge, whether *A.* brought a certain number of sheep from one town to another altogether? answered, That he did so; where in truth *A.* did not bring them all together, but part at one time and part at another, yet such witness was not guilty of perjury, because the substance of the question was, whether *A.* did bring them at all or not, and that manner of bringing them was only a circumstance. And upon the same ground it is said to have been adjudged, That where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties? answered, That it was, where in truth it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because as the case was it was no way material whether it were paid for one or both. Also it is said to have been resolved, That a witness who swore that one drew his dagger and beat and wounded *J. S.* where in truth he beat him with a staff, was not guilty of perjury, because the beating only was material. 1 Freem. 306.
1 Sid. 274.
Vide inf. §. 22.
Aleya 79.
1 R. Abr. 141.
78.
C. Eliz. 500.
Salkeld 514.
Noy 36.
2 Roll. 245.
C. Car. 521.
Hobart 53.
Carth. 422.
5 Mod. 345, 348.
3 Inst. 164.

2 Roll. 41. 369.

2 Roll. 42.

Hetley 97.

But perhaps in all these cases it ought to be intended, That the question was put in such a manner, that the witness might

reasonably apprehend that the sole design of putting it, was to be informed of the substantial part of it, which might induce him thro' inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly, That the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. And upon these grounds, I cannot but think the opinion of those judges very reasonable, who held, That a witness was guilty of perjury, who in an action of trespass for breaking the plaintiff's close, and spoiling it with sheep, deposed that he saw thirty or forty sheep in the said close, and that he knew them to be the defendant's, because they were marked with such a mark, which he knew to be the defendant's mark, where in truth the defendant never used such a mark; for the giving such a special reason for his remembrance could not but make his testimony more credible than it would have been without it; and though it signified nothing to the merits of the cause, whether the sheep had any mark at all or not, yet inasmuch as the assigning such a circumstance in a thing immaterial had such a direct tendency to corroborate the evidence concerning what was most material, and consequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue, there doth not seem to be any reason why it should not be equally punishable. But I cannot find this matter any where thoroughly settled or debated, and therefore shall leave it to every man's own judgment, which from the consideration of the circumstances of each particular case, may generally without any great difficulty discern whether the matter in which perjury is assigned, were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not.

1 Roll. 368.
Folmer 382.

But it is said in *Siderfin*, speaking as I suppose of an answer in chancery, that a man may be guilty of perjury at the common law by swearing a thing not material. But surely this ought not to be understood in so great a latitude, as if it were meant that every falsity in such an answer must needs be perjury, howsoever foreign, circumstantial and trivial the point wherein it is assigned may be, which is directly contrary to what seems to be clearly taken for granted in other books. And therefore perhaps

1 Siderfin 274.

perhaps where it is said that a man may be guilty of perjury in a thing not material, no more may be meant, but that he may be as well guilty thereof, by answering to a matter not charged in the bill, as by answering to the matters therein contained, which may alone be said to be material, because the defendant is not obliged in his answer to take notice of any thing else. Or else perhaps the meaning may be, That in a prosecution for perjury at common law, setting forth a false oath in such an answer, relating to the thing said to be in variance, the falsity shall be intended *prima facie* to have been some way material in the cause, unless the contrary be proved by the other side: Whereas in all prosecutions upon the statute, it is necessary expressly to shew in what manner the false oath is material to the cause in question, because that statute, extending only to such perjuries whereby some person is grieved, cannot maintain a prosecution which does not bring the case within the purview of it, by shewing that some one was grieved by the injury complained of, which he could not be, unless the thing sworn were some way material. However it seemeth to be clear, That a man may as well be guilty of perjury by a false oath tending to extenuate or aggravate the damages, as by an oath which is direct to the fact in issue. (3)

Vide Inf. c. 23.

C. Jac. 212.
12 Co. 101.
2 Leon. 198.

(3) It is not necessary that it appear to what degree the point in which a man is perjured, was material to the issue; for if it is but circumstantially material, it will be perjury. *Ld. Raym. and 233.* Much less is it necessary that the evidence be sufficient for the plaintiff to recover upon; for in the nature of the thing an evidence may be very material, and yet it may not be full enough to prove directly the point in question. *Ld. Raym. 889.* And it is incumbent on the prosecutor to prove the materiality of the perjury. *Q. B. 1784, p. 305.*

Sec. 9. As to the eighth particular, *viz.* How far the false oath must be credited, It hath been holden not to be material upon an indictment of perjury at common law, whether the false oath were at all credited, (4) or whether the party in whose prejudice it was intended, were in the event any way aggrieved by it or not, inasmuch as this is not a prosecution grounded on the damage to the party, but on the abuse of *publick justice*.

3 Leon. 230.
2 Leon. 211.

(4) But on the trial the oath will be taken as true, until it be disproved; and therefore to convict a man of perjury, a probable, credible witness is not enough; for the evidence must be strong, clear, and more numerous on the part of the prosecution than the evidence on the other side. Therefore, the law will not permit a man to be convicted of perjury, unless there are two witnesses at least. *Q. B. 1786, p. 812.* 10 Modern 195. Nor shall the party prejudiced by the perjury be admitted as a witness to prove it. *Ld. Raym. 356.*

Sec. 10. SUBORNATION of perjury by the common law, *2 R. Abr. 41,* seems to be an offence in procuring a man to take a false oath *57, 79.* amounting to perjury, who actually takes such oath; but it *Yelv. 72.* seemeth clear, That if the person incited take such an oath, *C. Jac. c. 58.* *C. Car. 337.* do not actually take it, the person by whom he was so incited *2 Keb. 392.*

3 Mod. 322.
Farres 101.
Vide p. 328.
For a further
punishment in-
dicted by 2 Geo. 2. c. 25. Vide also p. 335. sect. 29.

ed is not guilty of subornation of perjury; yet it is certain, That he is liable to be punished not only by fine, but also by infamous corporal punishment.

Of perjury by
5 Eliz. c. 9.

Sect. 11. Thus far of perjury, and subornation of perjury by the common law. And now I shall proceed to examine in what manner these offences are restrained by statute; as to which it is to be observed, that it is enacted by 5 Eliz. c. 9. "That whoever shall unlawfully and corruptly procure any witness, or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever, depending in suit and variance, by any writ, action, bill, complaint, or information, in any wise concerning any lands, tenements, or hereditaments, or goods, chattels, debts or damages, in any of the king's courts of Chancery, Whitehall, or elsewhere, within any of the king's dominions of England or Wales, or the marches of the same, where any person or persons shall have authority by virtue of the king's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine, any title of lands or any matter or witnesses concerning the title, right, or interests of any lands or tenements, or hereditaments, or in any of the king's courts of record, or in any leet, view, or frank-pledge or law-day, ancient demesne-court, hundred-court, court-baron, or in the court or courts of Stannary in the counties of Devon or Cornwall, or shall unlawfully and corruptly procure or suborn any witness or witnesses, who shall be sworn to testify *in perpetuam rei memoriam*, shall for such offence, being thereof lawfully convicted or attainted, forfeit the sum of forty pounds. And if any such offender so being convicted or attainted, shall not have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person shall suffer imprisonment by the space of one half year without bail or mainprize, and stand upon the pillory the space of one whole hour, in some market-town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

Sect. 12. Also it is further enacted by the said statute, par. 5. "That no person being so convicted or attainted, shall from thenceforth be received as a witness in any court of record, in any of the king's dominions of England, Wales, or the marches of the same, till such judgment against him shall be reversed by attain, or otherwise; and that upon every such reversal, the party
"grieved

"grieved shall recover damages against the party who did
 "procure the said judgment so reversed to be first given, &c." See 1 Stat. 216.

Stat. 13. And it is farther enacted, par. 6. "That if
 "any person or persons shall either by the subornation,
 "unlawful procurement, sinister persuasion, or means of
 "any other, or by their own act, consent, or agree-
 "ment, wilfully, and corruptly commit any manner of
 "wilful perjury, by his or their deposition, in any of
 "the courts before mentioned, or being examined *ad per-*
 "*petuam rei memoriam*, That then every such offender being du-
 "ly convicted or attainted, shall forfeit twenty pounds, and
 "have imprisonment by the space of six months without
 "bail or mainprize; and the oath of such an offender
 "shall not from thenceforth be received in any court of
 "record in England or Wales, until such judgment shall
 "be reversed, &c. on which reversal the party grieved shall
 "recover damages in the manner before mentioned."

And it is farther enacted, par. 7. "That if such offen-
 "der shall not have goods or chattels to the value of
 "twenty pounds, That then such person shall be set on the
 "pillory in some market place within the shire, city, or
 "borough, where the offence shall be committed by the she-
 "riff or his ministers, if it shall fortune to be without any
 "city or town corporate, and if it happen to be within any
 "such city or town corporate, then by the head officer of such
 "city, &c. where he shall have both ears nailed, &c."

Stat. 14. And it is further enacted, par. 8, 9. "That
 "one moiety of the said forfeiture shall be to the king, and
 "the other moiety to such person as shall be grieved, hinder-
 "ed, or molested, by reason of any of the offences be-
 "fore mentioned, that will sue for the same, &c. and that as
 "well the judge and judges of every such of the said courts
 "where any such suits shall be, and whereupon any such
 "perjury shall be committed, as also the justices of assize
 "and gaol-delivery, and justices of the peace at their quar-
 "ter sessions, (5) both within the liberties and without, (c) Prosecutions
 "may enquire of, hear, and determine all offences against upon this sta-
 "the said act." tute, binding on
all courts than
by indictment at

common law, are very seldom brought, especially at the sessions; and at common law, justices
 of the peace have no jurisdiction over the offence. 2 Hawk. c. 3. s. 13. Strange, 1085.
 The usual and most usual mode therefore is by indictment at the assizes, or in the King's
 Bench. 3 Burn. 224.

Stat. 15. But it is provided, par. 11. "That the said
 "act shall no way extend to any spiritual, or ecclesiastical
 "court, but that every such offender as shall offend in form
 "as aforesaid, shall be punished by such usual and ordi-
 "nary laws as are used in the said courts."

Punishment of
perjury.

Sect. 16. Also it is provided, par. 13. "That the said statute shall not restrain the authority of any judge, having absolute power to punish perjury before the making thereof, but that every such judge may proceed in the punishment of all offences, punishable before the making of the said statute in such wise as they might have done, and used to do, to all purposes, so that they set not upon the offender less punishment than is contained in the said act." From whence it seemeth undoubtedly to follow, that the court of King's Bench, &c. proceeding upon an indictment, or information of perjury, or subornation of perjury at common law, may not only set a discretionary fine on the offender, but also condemn him to the pillory, without making any enquiry concerning the value of his land or goods.

Offenders may
be transported.
Vide infra *sect.*
29. for the pu-
nishment of per-
sons convicted
of perjury, &c.
acting as attor-
nies.

† And by 2 Geo. 2. c. 25. made perpetual, by 9 Geo. 2. c. 8. "Besides the punishment already to be inflicted by law for so great crimes, it shall be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time; or otherwise to be transported for a term not exceeding seven years, as the court shall think most proper."

But for the better understanding of the other parts of this statute, I shall consider the following particulars: First, How far the very words of the statute must be pursued in a prosecution grounded thereon. Secondly, In what kind of oaths one may incur the danger thereof. Thirdly, How far the false oath must appear to have been prejudicial to some person.

2 Leon. 211.
214.
Shower 190.
C. El. 105. 147.
Savil 43.
3 Leon. 230.
Hut. y. 12.
Holt 534.
Skinner 403.

Sect. 17. As to the first of these particulars it hath been holden, That in every prosecution on this statute the words thereof must be exactly pursued, and therefore that an indictment or action on the said statute, alledging that the defendant deposed such a matter *falso & deceptive*, or *falso & corrupte*, or *falso & voluntarie*, without expressly saying, that he did it *voluntarie & corrupte*, is not good; and that such a defect cannot be supplied by adding the words *contra formam statuti*, or concluding *& sic voluntarium*, & *corruptum commissit perjurium*: Also it hath been holden, That it is necessary expressly to alledge that the defendant was sworn, and therefore that it is not sufficient to say, that *tacto per se sacro evangelii falso deposuit*.

Sect. 18.

Sec. 18. However it hath been resolved, That it is not necessary to shew whether the party, who is accused of perjury, did take the false oath through the subornation of another, or without any such subornation, notwithstanding the words of the statute are, "If any person either by the subornation, unlawful procurement, sinister persuasion, or means of any other, or by their own act, consent, or agreement, commit wilful perjury, &c." for inasmuch as there is no medium between the two branches of this distinction, so that all perjury whatsoever must needs come within one of them; and it is no way material under which of them it doth come, it is a reasonable exposition to look on the said words as put into the statute *ex abundanti*, seeing they express no more than the law must needs have implied without them; from whence it follows, That they operate no more than if they had not been expressed, and consequently shall not oblige the prosecutor necessarily to pursue them, which would put him under the difficulty not only of proving the perjury, which alone is material, but also of shewing it to be within one of the branches of the said distinction, which is nothing to the purpose.

3 Bald. 147.

Vic. up.
C. 10. s. 8.

Sec. 19. As to the second of the above mentioned particulars, viz. In what kind of oaths one may incur the danger of this statute, it hath been resolved, That no one can be guilty of perjury within the meaning thereof, in any case wherein a man may not possibly be guilty also of subornation of perjury within the same statute; for it is very reasonable to give the whole statute the same construction; nor can it well be intended, that the makers thereof, who expressly inflict a greater penalty on subornation of perjury, than on the perjury itself, should mean to extend the purview of the law in relation to what they esteemed the lesser crime, farther than in relation to that which they esteemed the greater; from whence it hath been argued and determined, That because that part of the statute, which concerns subornation of perjury, extends only to subornation of perjury in "Matters depending in suit by writ, action, bill, plaint, or information, in any wise concerning lands, tenements, or hereditaments, or goods, chattels, debts, or damages, &c." therefore the following clause concerning perjury itself, though it be penned in more general words, shall come under the same restriction. And from hence it clearly follows, That no perjury upon an indictment or criminal information, can bring a man within the danger of the statute, because they are omitted in the abovementioned clause. Also upon this ground it seems easy to account for the judgment in *Prior's case*, who being indicted for a perjury supposed to be committed by him in an information for the king, which as I suppose must be intended to have been a criminal one, was discharged upon an exception.

5 Co. 99.

C. Jac. 120.

3 Inst. 164.

exception taken to the indictment; but if the information whereon the said perjury was supposed to have been committed, had been of a civil nature, I do not see any reason why it should not be as well within the meaning, as it seems to be expressly within the words of the statute; for surely the opinion, That the king cannot by indictment, which is his own proper suit, punish his own witness, who swears for him, cannot be agreeable to law, because however the perjury of such a witness may seem to tend to promote the king's interest in relation to the cause which happens to be in dispute, yet certainly it is as heinous a crime in its own nature, and as much an abuse to justice, and of the same ill consequence to the publick, and consequently as worthy of the king's resentment, as if it had been taken against him.

But he is
punishable for
the same by
indictment at
common law.
Bur. Mansf.
2189.

(a) 1 C. Eliz. 148.
2 Leon. 201.
Dalton 84.
Yelv. 120.
(b) 2 R. Ab. 77.
(c) 2 Leon. 201.
(d) 1 Nov. 108.
Finch 450.
(e) Moor 627.

SECT. 20. Also it hath been resolved, That this statute extends to no other perjury except that of a witness, not only because the clause concerning subornation, to which the subsequent clause concerning perjury has a reference, relates to perjury by witnesses only, but also because the clause concerning perjury, mentions only perjury committed by persons in their examinations, *ad perpetuam rei memoriam*, or else in their depositions in some of the courts above mentioned, which in common speech are taken for such oaths only as are taken by a witness; and from hence it follows, That no one can come within the statute by reason of any false oath in an (a) answer to a bill in Chancery, or in (b) swearing the peace against another, or in a (c) presentative made by him as homager of a court-baron, or by reason of a false (d) wager of law, or for taking a false oath before (e) commissioners appointed by the king to make an inquiry concerning his title to certain lands.

2 R. Ab. 77.
1 Roll 79.
3 Keble 345.

SECT. 21. Also it hath been said, That he who makes a false affidavit against a man in a court of justice is not within this statute. But perhaps the books wherein this opinion is holden, ought to be intended only of such affidavits which no way relate to a cause depending in suit before such court; for if they be of such a nature, That either of the parties in variance be grieved, hindered, or molested in respect of their cause in such court by reason of the perjury; as where a trial is put off, or a judgment or execution set aside upon a false affidavit; the offence seems to be not only within the meaning of the statute, but also within the very letter of it, unless the words, witnesses and depositions are confined to so strict a signification, as to bear no kind of application to any other person or oaths, except those which are made use of upon the trial of the issue in question, for which I cannot find any good authority. However partly perhaps from this notion, and partly

Vide 2 Leon. 40.
1 R. Ab. 3042.

because

cause the statute speaks expressly only of depositions in the courts above mentioned, it hath been questioned, Whether a false oath before a sheriff upon a writ of enquiry of damages, within the statute or not? But if it be considered, That a party to whose prejudice such a false oath is taken as much aggrieved by it, as if it had been taken in the very court, and the principal judgment of the cause depends upon such an inquiry; and the depositions made before the sheriff, may as properly be said to be depositions in the court, by which the sheriff is commissioned to take the inquiry, as depositions taken before justices of *nisi prius*, upon a trial of an issue joined in a superior court, which are undoubtedly within the meaning of the statute; and also inasmuch as those who give evidence before a sheriff upon such an inquiry may, in the common use of words, be as properly called witnesses, as those who give evidence before the court in which an issue is joined, it seemeth to be the more plausible opinion, that such a perjury is within the statute: But since it is disputable, whether it be so or no, and it is certain that it is perjury at common law, and that in all cases whatsoever where a man takes a false oath, which is not perjury within the statute, but is looked on as perjury at common law, he is still punishable for it by indictment or information at the common law, it is certainly most advisable to prosecute such an offender at the common law, and not upon the statute.

Obf. on the
stat. 71.

See the authorities
above cited.

C. Jac. 1.

King v. Thornogod, Trin. 9 Geo. 1. The defendant made an affidavit in the Common Pleas, and confessed it was false; the court recorded his confession, and sentenced him to the pillory. It was objected that this court has no jurisdiction, and that he ought to be brought before the court by indictment, but these objections were over-ruled, because any court may punish such an offence committed in *false curia*, under this act of 5 Eliz. c. 9. 8 Mod. 179.

Sec. 22. As to the third particular, *viz.* How far the false oath must appear to have been prejudicial to some person, it hath been collected from the above mentioned clause which giveth an action to the party grieved by the offences mentioned in the statute, That no false oath is within the meaning thereof, which does not give some person a just cause of complaint; and upon this ground it hath been said, That he who swears a thing which is true, but not known by him to be so, is not within the statute, because howsoever heinous his offence may be in its own nature, yet, when it proves in the event to be in maintenance of the truth, it cannot be said to give him a just cause of complaint, who would take advantage against another from his want of legal evidence to make out the justice of his cause.

3 Inst. 166.
Vid. sup. f. 3.
Hutley 97.
Contra.

Sec. 23. Also from the same ground it seemeth clearly to follow, That no false oath can be within the statute, unless

Vide sup. f. 8,
 & 3 Inst. 167.

Co. Ent. 164.
 6 Mod. 168.
 2 Roll. 76.
 1 Kcb. 452-935,
 941.
 Raym. 202.
 2 Leon. 12.
 2 Roll 427.
 C. Car. 351,
 352, 353.
 1 Kcb. 452.
 C. Eld. 412.

7 Kcb. 935,
 941.

Sid. 106.

3 Leon. 12.
 3 Leon. 63.

2 Leon. 40.

less the party against whom it was sworn suffered some kind of disadvantage by it, for otherwise it cannot be said that any one was grieved, hindered, or molested by it; and therefore it is certain, That in every prosecution upon the statute, it is necessary to set forth the record of the cause wherein the perjury complained of is supposed to have been committed; and also to prove at the trial of the cause, that there is actually such a record, by producing the record itself, or a true copy thereof, which must agree with that which is set forth in the pleadings, without any material variance; for otherwise it cannot legally appear, That there ever was such a suit depending, wherein the party might be prejudiced in the manner supposed. Also it seems to be agreed, That it is necessary not only to set forth the point wherein the false oath was assigned, but also to shew in what manner it conduced to the proof or disproof of the matter in debate between the parties; and it hath been adjudged, That an indictment setting forth a suit concerning the manor of *Dale*, and assigning a false oath concerning the manor (*Manerium prædictum innuendo*) is not good, because it no otherwise appears, That the false oath did concern the manor of *Dale*, but by the *Innuendo*, which is not a sufficient averment. Also upon the same ground it seems to be safest in a prosecution upon the statute for a false oath in Chancery, to set forth the bill and answer, That the plaintiff may appear to have been aggrieved by it; and for the same reason it seemeth also, That you ought, in such a prosecution of a witness in Chancery, to set forth the interrogatory in particular, and to shew how it was material. Also it hath been resolved, That as in an action on the statute brought by one person, it must appear, That the false oath was prejudicial to the plaintiff; so in an action by more than one, it must appear to have been prejudicial to every one of the plaintiffs: And it hath been said, That it is not sufficient to shew that the false oath caused the court to make an award against the plaintiff, unless it also appear that such an award was prejudicial to him, and therefore where the plaintiff at a trial in ejectment challenged a juror, and proved his challenge by a false oath, by reason whereof the inquest was not taken, and consequently the possession of the defendant, who had a defeasible title, continued longer than it otherwise would have done; it hath been adjudged, That such a defendant cannot have an action on the statute against such witness, because in truth he gained an advantage by the perjury. Also it hath been holden, That it is not sufficient to shew that the perjury, for which an action is brought upon the statute, was actually prejudicial to the plaintiff, unless it be also shewn to have been made in some cause which may properly be said to have been depending

pending in suit between him and the person for whom
 e witness was examined; and therefore it hath been holden,
 hat where A. brought a bill in Chancery against B. and
 e lord keeper, by an order made C. to be as a party
 the bill against B. and afterwards a commission went forth
 examine witnesses between B. and C. upon which D.
 ing produced as a witness on the part of C. swore directly
 r him against B. whereupon a decree was made against
 . yet B. cannot have an action on the statute, because
 . was not a party to the suit, but came in *a latere*, by
 1 order; and it is said, That the words of the statute are,
 where one is grieved by a deposition in a suit between
 party and party;" but perhaps the authority of this opi-
 ion may justly be questioned, not only because the words
 f the statute whereon it is grounded are mistaken, but also
 ecause the offence seems in truth to be both within the
 meaning and letter of the law, since thereby a person is
 grieved in respect of a cause depending in suit in a court
 mentioned in the statute: However there seems to be no
 doubt, but that a perjury which only tends to increase or
 lessen the damages to be given to a plaintiff, is as much
 within the statute, as any perjury which goes directly to the
 point of the issue: Also it seemeth to be settled, That per-
 jury in a cause wherein an erroneous judgment is given, is
 a good foundation of a prosecution upon the statute, while
 such judgment stands unreversed.

2 Leon. 198.

1 Keb. 9.

Raymond 74.

1 Sid. 148.

2 Keb. 718.

854.

1 Keb. 521.

† *Stat. 24.* It is enacted by 8 Geo. 1. c. 6. "That if
 any person making such affirmation or declaration as is ap-
 pointed by this act, shall be lawfully convicted of wilful,
 false and corrupt affirming or declaring any matter or thing,
 which if sworn in the common or usual form, would have
 amounted to wilful and corrupt perjury; every person so
 offending shall incur and suffer such and the same pains,
 penalties and forfeitures as are inflicted or enacted by the
 laws against persons convicted of wilful and corrupt per-
 jury."

Quakers.

† *Stat. 25.* It is also enacted by 31 Geo. 2. c. 10. s. 24.
 "That whosoever shall willingly and knowingly take a false
 oath, or procure any person to take a false oath, to obtain
 the probate of any will or wills, or to obtain letters of ad-
 ministration in order to receive the payment of any wages,
 pay, or other allowances of money, or prize money, due,
 or that were supposed to be due, to any officer, seaman, or
 other person intitled, or supposed to be intitled, to any
 wages, pay, or other allowances of money or prize money,
 for service due on board of any ship or vessel of his ma-
 jesty, &c. or the executor, administrator, wife, relation or
 creditor of any such officer or seaman, or other person who

Probate of wills.
O. B. 1784. 21
909.

and every of them

"That

and every of them

“ has really served, or was supposed to have served on board
 “ of any ship or vessel of his majesty, &c. shall be deemed
 “ guilty of felony, and suffer death without benefit of
 “ clergy.” (6)

(6) By 28 Geo. 2. c. 13. s. 14. For the relief of insolvent debtors, if any sheriff or other officer perjure himself, in taking the oaths directed by the act, he shall forfeit 500 l.—And if the offence be committed by a prisoner, or other person enabled and intending to take the benefit of the act, it is felony without clergy.—Vide, also, 23 Geo. 3. c. 31. respecting perjury of freeholders at elections for Cricklade.

Form of the indictment.

+ *Sett.* 26. It is recited by 23 Geo. 2. c. 11. “ Whereas by reason of difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes have frequently gone unpunished.” For remedy whereof it is enacted “ That in every information or indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, (averring such court, or person or persons to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter, or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, (7) information, indictment, declaration, or any part of any record or proceeding, either in law or equity other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed.”

(7) In perjury in an answer in Chancery it is not necessary to prove the identity of the person who swore the oath; it is sufficient if the hand writing be proved and that the jurat was subscribed by the master as being sworn before him, 2 Burrow 1189. See vide O. B. 1784. p. 912.

+ *Sett.* 27. It is also further enacted by par. 2. “ That in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed.” (8)

(8) In general the court will oblige the defendant to plead or to demur to even a defective indictment for this offence. 2 Hawk. c. 25. s. 146. They are also very cautious in granting a *certiorari* to remove it. 2 Hawk. c. 27. s. 28. And Lord Thurlow refused permission to amend an answer, where an indictment for perjury had only been threatened, even where the party, having no interest, could not be supposed to make the false oath intentionally.—*Brown's Cases in Chancery*, 419. For it is the province of the grand jury to judge of the intention. *Vaux v. Lord Waltham*. And what the grand jury may find, the court will never expunge. B. R. H. 203.

Sett.

† *Stat.* 28. And the better to prevent great offenders from escaping punishment by reason of the expence attending such prosecutions, It is further enacted by p. 3. "That it shall and may be lawful to and for any of his majesty's justices of assize, or nisi prius, or general gaol delivery, or of any of the great sessions of Wales, or of the counties palatine; and they are hereby authorised (sitting the court or within twenty four hours after) to direct any person examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall, and are hereby required to do their duty without any fee, gratuity, or reward for the same." Such prosecution is also exempted from tax or duty and fees of court, and the clerk of the assize is ordered to give the prosecutor a certificate of the same, being directed, with the counsels names, &c.

The court may order perjured witnesses to be prosecuted.

† *Stat.* 29. And it is further enacted by 12 Geo. 1. c. 29 f. 4. "That if any person who hath been, or shall be convicted of wilful and corrupt perjury, or subornation of perjury, (9) shall act or practise as an attorney or solicitor, or agent in any suit or action, in any court of law, or equity, in England, the judge or judges of the court where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way (10) in open court, and if it shall appear to the satisfaction of such judge or judges, that the party hath offended contray to this act, such judge or judges, shall cause such offender to be transported for seven years."

Attornies.

(9) Or of forgery or common barratry.

(10) Vide 3 Bar. K. B. 34.

CHAPTER THE SEVENTIETH.

OF FORGERY.

OF Forgery there are two kinds: First, By common law. Secondly, By the statute. Britt. 16.
Fleta 2. c. 22

Stat. 1. Forgery by the common law seemeth to be an offence in falsly and fraudulently making or altering any matter of record; or any other authentick matter of a publick nature; as a parish register or any deed or will; punishable by fine and imprisonment, and such other corporal punishment as the court in discretion shall think proper.

For the better understanding whereof, I shall endeavour to shew: First, In what cases the making or altering of a writing, shall be said to be so far false and fraudulent, as to amount to forgery. Secondly, That a man may be guilty of forgery in respect of all the above mentioned writings, and no other.

Sec. 2. As to the first particular, it is said to be possible for a man knowingly to make a deed in his own name, and also to sign and seal it himself, which yet in judgment of law, may be no better than a downright forgery; as if a man make a feoffment of certain lands to J. S. and afterwards make a deed of feoffment of the same lands to J. D. of a date prior to that of the feoffment to J. S. in which case he is said to be guilty of forgery, because he knowingly falsifies the date, in order to defraud his own feoffee, by making a second conveyance which at the time he had no power to make. Also it is said, That his crime would have been no less, if by his conveyance he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antedated conveyance endeavoured to avoid it. Also in many other cases a writing may be said to be forged where neither the hand nor seal of any one are forged; as where one being directed to draw up a will for a sick person, doth insert some legacies therein of his own head; or where one finding another's name at the bottom of a letter at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, and then takes off the seal, and fixes it under the release; or where one inserts into an indictment the names of those against whom in truth it was not found; or where one makes any fraudulent alteration of the form of a true deed in a material part of it; as by making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into an S. or by making a bond for five hundred pounds, expressed in figures, seem to have been made for five thousand, by adding a new cypher. But Sir Edward Coke seems to say, That a deed so altered may more properly be called a false than a forged writing, because it is not forged in the name of another, nor his seal nor hand counterfeited. But I see no good reason why such an alteration of a deed should not as properly be called forgery, as the entire making of a new deed in another's name; for in both cases not only the fraud and villainy are the very same, but also a man's hand and seal are falsely made use of to testify his assent to an instrument, which after such an alteration is no more his deed than a stranger's. Also the notion of forgery doth not seem so much to consist in the counterfeiting

a man's

3 Inst. 169.
Pulton 46.
27 H. 6. 3.
Moor 655, 759.
Noy 101.
3 Inst. 170.
Cum. Dyer 288.

3 Inst. 172.

3 Modern 66.
3 Modern 192.
Fitzgibbon 261.
22 Mod. 493.
496.
Strange 69.

3 Inst. 169.
Moor 619.

3 Inst. 169.

Vide Moor 619.
3 Modern 66.

a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and justice it ought not to have, as appears by the foregoing cases in this section, to most of which Sir Edward Coke himself seems to agree.

Vide 2 R.
Ab. 27, 29.
11 Coke 27.

Foster 116.

Sec. 3. But it seemeth to be clear, That he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks on this as the other's own sealing.

Pulton 46.
21 H. 6. 4.

Sec. 4. Also it hath been adjudged, That he shall not be punished for forgery who raseth out the word *libris* out of a bond made to himself, and putteth in *Marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet it is said, That it would be forgery, if by the circumstances of the case it should any way appear to have been done with an eye of gaining an advantage to the party himself, or of prejudicing a third person. Also it is holden, That such an alteration, even without these circumstances is a misdemeanor, though it be no forgery.

Noy 99.
Moor 655.
Salk. 375.

Sec. 5. It hath been resolved, That a man shall not be adjudged guilty of forgery for writing a will for another without any directions from him, who becomes *non compos* before it is brought to him; for it is not the bare writing an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery.

Moor 760.

Sec. 6. It is said, That regularly a man cannot commit an act of forgery by a bare nonfeasance, as by omitting a legacy out of a will, which he is directed to draw for another. Yet it hath been holden by some, even in this very case, That if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causeth a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, he who makes such an omission is guilty of forgery. In this case the first enquiry should be, with what intention the omission was made.

Moor 760.
Noy 101.

1 Sid. 142.

Sett. 7. It seemeth to be no way material, whether a forged instrument be made in such a manner, That if it were in truth such as it is counterfeited for, it would be of validity, or not; and upon this ground it hath been adjudged, That the forgery of a protection in the name of A. B. as being a member of parliament, who in truth at the time was not a member, is as much a crime as if he were.

And now I am to shew in the second place, That a man may be guilty of forgery at common law, in respect of any of the above-mentioned writings, and of no other.

1 R. Abr. 65, 76.
Yelv. 146.
C. Eliz. 178.
3 Mod. 66.
8 Mod. 192.
12 Mod. 493,
496.
Strange 69.

Sett. 8. And first it is clear, That one may be guilty thereof by the common law, by counterfeiting a matter of record; for since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the publick, to have them either forged or falsified.

(a) 1 R. Abr. 68.
C. Car. 326.
1 Jones 325.
(b) 1 R. Abr. 65.
2 Bulst. 137.
(c) 1 Lev. 138.
(d) 1 Sid. 142.

Sett. 9. Secondly, Also there seemeth to be no doubt, but that one may be guilty of this crime by the common law, by forging any other authentick matter of a publick nature, as a (a) privy seal, or a (b) licence from the barons of the Exchequer to compound a debt, or a (c) certificate of holy orders, or a (d) protection from a parliament man.

(e) 1 R. Abr. 66.
Raymond 81.
Owen 47.
1 Sid. 278.
3 Leon. 170.
(f) Moor 760.
Noy 101.
Dyer 302. It is
now made felony
by 2 Geo. 2. c.
25. ante, p. 210.

Sett. 10. Thirdly, It is also unquestionable, That a man may be in like manner guilty of forgery at common law, by forging a (e) deed, and surely there cannot be any reason to doubt, but that one may be equally guilty by forging a (f) will, which cannot be thought to be of less consequence than a deed. But I do not find this point any where directly holden.

(g) 1 Roll. 431.
1 Sid. 16, 155,
451.
1 R. Abr. 66.
Winch. 40, 90.
3 Leon. 231.
1 Leon. 101.
C. Eliz. 256.
853.
3 Bulst. 265.
(h) C. Eliz. 166.
1 Yelv. 146.
1 Bulst. 265.
(i) P. N. B.
96, 99, 100.

Sett. 11. As to other writings of an inferior nature, it seems to have been generally laid down as a (g) rule, That the counterfeiting of them is not properly forgery; (b) and some have gone so far as to hold, That the forging another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all; and therefore it cannot but be more safe to proceed against offences of this nature, as cheats than as forgeries; but surely it cannot be proved by any good authority, That such base crimes are wholly disregarded by the common law, as not deserving a publick prosecution; for the opinion in the books above cited, That they are punishable by no law, seems by no means to be maintainable, since many of them are most certainly punishable by force of 33 Hen. 8. c. 1. which is set forth at large in the following chapter. Neither can it be a convincing argument, That they are not punishable at common law, (i) because

because they are of a private nature; since deeds concerning private matters are also of a private nature, as much as other writings concerning such matters; yet no one will say, That the making a false deed concerning a private matter is not punishable at common law. But perhaps it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof hath been already shewn to be properly punishable as forgery, and the counterfeiting of other writings of an inferior nature, that the former is in itself criminal, whether any third person be actually injured thereby or not, but that the latter is no crime, unless some one receive a prejudice from it. (1)

(1) Vide Barnard, K. B. 10. Ld. Raym. 1461. 2 Bac. Abr. 568. Where these opinions were very fully considered in the case of the King v. John Ward, of Hackney; and in which it was determined that to forge a release or acquittance for the delivery of goods; although not under seal, was forgery at common law. Vide also Lord Raym. 737. 5 Mod. 137. Raym. 51. and Strange 747.

SECT. 12. THUS far of Forgery by common law.—And now I am to consider forgery by the statute, which depends upon 5 Eliz. c. 14. by which it is enacted, “ That if any person or persons upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsly forge or make, or subtilly cause, or wittingly assent to be forged or made, any false deed, charter, or writing sealed, court roll, or the will of any person or persons in writing, to the intent that the state or freehold or inheritance of any person or persons of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest, of any person or persons, of, in, or to the same, or any of them, shall, or may be molested, troubled, defeated, recovered or charged; or shall pronounce, publish, or shew forth in evidence, any such false and forged deed, charter, writing, court roll, or will, as true, knowing the same as false and forged, as is aforesaid, to the intent above remembered, (except being an attorney, lawyer, or counsellor, he shall for his client, plead, shew forth, or give in evidence such false and forged deed, &c. to the forging whereof he was not party nor privy) and shall be thereof convicted either upon action or actions of forgery of false deeds, to be founded upon the said statute, at the suit of the party grieved or otherwise, according to the order and due course of the laws of this realm, &c. shall pay unto the party grieved his double costs and damages to be found or assessed in that court where such conviction shall be, and also shall be set upon the pillory in some open market town, or other open place, and there have both his ears cut off, and also his nostrils slit and cut, and seared with a hot iron, &c. and shall forfeit to the king the whole issues

Of Forgery by 5 Eliz. c. 14.

See Statute 46.

Par. 13.

“ and profits of his lands and tenements, and suffer perpetual imprisonment, &c.”

Stat. 13. And it is farther enacted by the said statute, par. 3. “ That if any person or persons, upon his or their own head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly and falsly forge or make, or wittingly, subtilly, and falsly cause or assent to be made and forged, any false charter, deed or writing, to the intent that any person or persons shall, or may have, or claim any estate or interest for a term of years, of, in, or to any manors, lands, tenements, or hereditaments, not being copyhold, or any annuity in fee-simple, fee-tail, or for term of life, lives or years, or shall as is aforesaid, forge, make, or cause, or assent to be made or forged, any obligation, or bill obligatory, or any acquittance, release, or other discharge of any debt, accompt, action, suit, demand, or other thing personal; or shall pronounce, publish or give in evidence, (except as before excepted) any such false or forged charter, deed, writing, obligation, bill obligatory, acquittance, release, or discharge, as true, knowing the same to be false and forged, and shall be thereof convicted by any of the ways and means aforesaid, he shall pay unto the party grieved his double costs and damages, to be found and assessed in such court, where the said conviction shall be had, and shall be also set upon the pillory in some open market town, or other open place, and there have one of his ears cut off, and also shall suffer imprisonment for one year, &c.”

Lutw. 190.

A second offence
felony without
clergy.

Stat. 14. And it is farther enacted by the same statute, par. 7 & 8, “ That if any person or persons being convicted or condemned of any of the offences aforesaid, by any of the ways or means above limited, shall after any such his or their conviction or condemnation, estoons commit or perpetrate any of the said offences in form aforesaid, that then every such second offence shall be adjudged felony without benefit of clergy, saving to all persons other than the said offenders, and such as claim to their uses, all such rights, &c. which they shall have to any the hereditaments of any such person, so as is aforesaid convicted or attainted, at any time before, &c. saving also the dower of such offender's wife, and the right of his heirs.

Stat. 15. And it is further enacted by the said statute, par. 10. “ That all justices of oyer and terminer, and justices of assize, shall have power to inquire of, hear and determine the offences aforesaid.”

Stat. 16. But it is provided, par. 9, 12, & 16. “ That this act or any thing therein contained, shall not extend to any

“ any ordinary or his commissary, &c. for putting their seal
 “ of office to any will to be exhibited unto them, not know-
 “ ing the same to be false or forged, or for writing of the said
 “ will or probate of the same, nor to any proctor, &c. of any
 “ ecclesiastical court, for the writing, setting forth, or plead-
 “ ing of any proxy made according to the ecclesiastical law,
 “ &c. for the appearance of any person being cited to appear
 “ in such court; nor to any archdeacon, or official, for put-
 “ ting their authentick seal to the said proxy or proxies, nor to
 “ any ecclesiastical judge for admitting the same; nor to any
 “ person who shall plead or shew forth any deed or writing ex-
 “ emplified under the great seal of England, or under the seal
 “ of any other authentick court of this realm; nor to any per-
 “ son who shall cause any seal of any court to be set to
 “ any such deed, charter, or writing enrolled, not knowing
 “ the same to be false or forged.”

In the construction of this statute the following points have been holden, 1 Hale 682, 68

Sec. 17. First, That a false customary of a copyhold ma- Dyer 322.
 nor, made in parchment under the seals of several tenants of the 3 Leon. 108.
 manor, and containing in it divers false customs, apparently
 tending to the disherison of the lord, and falsely pretending by
 its title to be set forth by the consent of all the tenants, and
 allowance of the lord, is within the first branch of forgery
 mentioned in the statute, as being a sealed writing made
 to the intent to molest the inheritance of the lord.

Sec. 18. Secondly, That the forgery of a lease for years, 3 Inst. 17.
 or of a grant of a rent-charge for years, in the name of Noy 42.
 one who is seised of a freehold or inheritance, is also with-
 in the said first branch of the statute, because the said
 branch is penned in general words extending to any mole-
 station whatsoever of such estate, without mentioning any
 estate or interest, in the claim whereof such molestation shall
 consist; and from this ground it follows, that those words in
 the second branch of forgery mentioned in the statute, “ To
 “ the intent that any person shall claim any estate or in-
 “ terest for term of years, &c.” are meant only of such
 forgeries which relate to such an estate or interest in *esse* before.

Sec. 19. Thirdly, That the forgery of a will in writing Dyer 302.
 of one possessed of such an estate, mentioning a bequest there-
 of, is within the said second branch of the statute, as being
 a false writing, made to the intent that some person may
 claim an estate for years; notwithstanding the said branch
 makes no express mention of a will, as the first doth.

Sec. 20. Fourthly, That the forgery of a lease of lands in 3 Leon. 170.
 Ireland is not within either of the branches of the statute.

3 Leon. 170.

Sec. 21. Fifthly, That the forgery of a deed containing a gift of mere personal chattels, is also no way within the statute, the words whereof to this purpose are, "If any person shall forge any obligation or bill obligatory, or any acquittance, release, or other discharge of any debt, account, action, suit, demand, or other thing personal."

See C. 42, & 62.

1 Freeman 398.

15 H. 7 15.

2 R. Abr. 466.

Cun. 31st. 171.

Sec. 22. Sixthly, That the forgery of a statute-merchant or of a recognizance in the nature of a statute-staple, by acknowledging them in the name of another are within the statute, as being obligations, because they must have the seal of the party, by the express words of the statutes, which appoint in what manner such statute or recognizance shall be taken. But that the forgery of the statute-staple is no way within the statute, because it needeth not the seal of the party, but only the seal of the staple provided for it.

3 Inst. 171.

1 Hale 685.

Sec. 23. Seventhly, That he who is truly informed by another, that a deed is forged, is in danger of the statute if he afterwards publish the same to be true; notwithstanding the words of the statute be, "If any one shall publish, &c. such false and forged deed, &c. knowing the same to be false or forged."

3 Inst. 172.

Sec. 24. Eighthly, That the double damages to be awarded to the party grieved by a forged release of an obligation, &c. shall be governed by the penalty, and not by the true debt appearing in the condition.

3 Inst. 172.

Sec. 25. Ninthly, That one who hath been convicted of publishing a forged deed, may become guilty of felony by forging another deed afterwards, as well as by publishing any such deed, notwithstanding the second offence be not of the very same nature with the first; for the words of the statute are, "If any person being convicted or condemned of any of the offences aforesaid, &c. shall after any such conviction or condemnation, either commit any of the said offences."

21 Modern 3.

Holt 326.

3 Keb. 356. 367.

3 Inst. 169.

See 1 Keb 849.

2 Keb. 129.

Of the cases of

this kind.

2 Keb 245.

501, 512.

Furzeuey 150.

Sec. 26. Tenthly, That notwithstanding it be necessary in every prosecution upon the statute strictly to pursue the very words of it, (for which cause it hath been resolved, That an indictment setting forth the forgery of a writing indented, without adding that it was sealed, is sufficient;) yet there is no necessity that the translation of such words be made in proper classical Latin, so that it be intelligible; and upon this ground it hath been adjudged, That an indictment, setting forth that the defendant *super caput suum proprium* did forge, &c. meaning thereby to express that he did it of his own head, is sufficient.

Sec.

Sec. 27. Eleventhly, That upon indictment of trespass, forgery, and publication of a deed, a verdict finding the defendant guilty *de transgressionibus & forgeria prædictis prout superius in indictmente supponitur*, is sufficient, because these words *de transgressionibus prædictis* include the whole. Also perhaps such a verdict may be sufficient for another reason, because the offence is equally within the statute, and the punishment the very same, whether the party be guilty both of the forgery and publication, or of one of them only.

For other determinations upon upon this statute, vide 2 Bac. Abr. 571. Keb. 707, 748, 803. Barnard, K. B. 168, 441, 461. and the case of the King v. Crooke. Strange 901. Besides this general act, a multitude of others, since the revolution, when paper credit was first established, have, in a variety of instances, inflicted capital punishment, on the crime of forgery. For which vide ante chapter fifty eight.

CHAPTER THE SEVENTY-FIRST.

OF CHEATS.

OF Cheats punishable by publick prosecution, there are two kinds: By the common law, and By statute.

Sec. 1. And first it seemeth, that those which are punishable at common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right by means of some artful device, contrary to the plain rules of common honesty; as by (a) playing with false dice; or by (b) causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by (c) perswading a woman to execute writings to another, as her trustee upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c. or by (d) suppressing a will, or by (e) levying a fine in another's name, or (f) suing out an execution upon a judgment for him, or acknowledging an action in his name, without his privity, and against his in which cases, by some good (g) opinions the record may be vacated.

(a) 2 Roll. 107.
C. Jac. 497.
498.
2 R. Abr. 78.
1 Keb. e 329.
Par. Case 6.
Modern 42.
Farresley 40.
(b) 1. Sid. 312.
(c) 1 Sid. 431.
(d) Noy 103.
(e) Noy 99.
Moor 632.
C. Eliz. 531.
1 Modern 46.
2 Jones 4.
(f) Noy 99.
(g) See the
books above ci-
ted, but 2 R.
Abr. 873.
12 Co. 2336
are contrary.

Sec. 2. It (b) seemeth to be the better opinion, That the deceitful receiving of money from one man to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance,

(L) 6 Mod. 105.
Saikeld 379.
3. Modern 12.
Blackbery 70.
L. Ray. 101.
Soll. Cal. 201.

Vide Wheatley's
Case, Burr. 1125
Black. 273.

but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security.

See the authorities cited in
sect. 1. And the
acts recited in-
fra. sect. 8 and
9.

Sect. 3. Some of the above-mentioned offences are punishable not only with fine and imprisonment, but also with farther infamous punishment, (as cheating with false dice, especially if the offender be a common gamester) others are punishable with fine and imprisonment only, by the discretion of the judges, which is regulated by the circumstances of each particular case; and some of them are made felonies by 21 Jac. c. 26. as appeareth from chapter forty-five.

(1) Changing corn by a miller and returning bad corn instead of it, is punishable by indictment; for being in the way of trade it is deemed an offence against the publick, 1 Sess. Ca. 217. So also to run a foot race fraudulently, and by a previous understanding with the seeming competitor to win money. 6 Mod. 42. So also if an indentured apprentice enters himself as a soldier, and receives the bounty, and is discharged on his master's demanding him, he may be indicted. The King v. Jones, Lent Ass. Coventry, 1777.

1 Hale 506.
2 Sess. Caf. 27.
Strange 866.
Bar. K. B. 298,
331.
Salkeld 379.
6 Mod. 105,
111, 301, 311.
9 St. Tr. 67.

Sect. 4. Offences of this kind by statute depend upon 33 Hen. 8. c. 1. by which it is enacted, "That if any person or
" persons shall falsely and deceitfully obtain or get into his or
" their hands or possession, any money, goods, chattels,
" jewels, or other things of any other person or persons,
" by colour and means of any privy false token, or counterfeit
" letter made in another man's name, to a special friend or
" acquaintance, for the obtaining of money, &c. from such
" person, and shall be thereof convicted, by witness taken
" before the lord chancellor, or before the justices of assize,
" or before the justices of peace of any county, city, borough,
" town, or franchise, in their general sessions, or by action
" in any of the king's courts of record, every such offen-
" der shall suffer such punishment by imprisonment, set-
" ting upon the pillory, or otherwise by any corporal pains
" except pains of death, as shall be appointed by those before
" whom he shall be so convicted."

Dutton 32.

Sect. 5. And it is farther enacted by the said statute, "That
" as well the justices of assize for the time being, as also two
" justices of peace in the same county, whereof the one to be
" of the *quorum*, may call and convene by process, or other-
" wise, to the said assizes, or general sessions, any person be-
" ing suspected of any of the offences aforesaid, and to com-
" mit or bail him till the next assizes or general sessions, &c."

3 Inst. 121.
C. Car. 564.

Sect. 6. Sir Edward Coke is of opinion, That the offender cannot be fined in a prosecution upon this statute, because it is expressly ordained, That some corporal punishment shall be inflicted, and no other is mentioned; however, there is a precedent in Croke's Reports, by which it appears, That one convicted on such a prosecution hath been adjudged not only to stand

stand on the pillory, but also to pay a fine of five hundred pounds, and to be bound with good sureties to his good behaviour. (2)

(2) In indictments upon this statute, the false token made use of must be set forth. *Str.* 1127. And it has been held a false token to use for the purposes of deceit a counterfeit pass. *Dalt.* 91. Or a pretended power to discharge soldiers. 1 *Latch* 202. Or to obtain goods upon pretence of being of age and then pleading infancy. Or to produce papers purporting to be orders from abroad, and under the pretence of being a merchant to obtain goods. *Sayer* 266. Or to exchange a spurious wine for a genuine commodity under the pretence of being a merchant and broker. 6 *Mod.* 302. Or to sell the flesh of an unbated bull as for steer beef. *Sayer* 147. Or to sell any commodity by a false measure. *Burr* 1115. But selling beer short of the just and due measure is not an indictable offence. 1 *Willson* 301. *Sayer* 146. 1 *Black.* 274. Nor selling gum of one denomination for that of another. *Sayer* 205. Nor selling wrought gold as and for gold of the true standard, provided the offender is not a goldsmith. *Cowper* 323.

† *Stat.* 7. It is also enacted by 30 Geo. c. 24. "That all persons who knowingly and designedly by false pretences shall obtain from any person, money, goods, wares, or merchandizes with intent to cheat and defraud any person or persons of the same, shall on conviction be put in the pillory, or publicly whipped, or fined and imprisoned, or transported, not exceeding the space of seven years, as the court shall in discretion think fit." *O. B.* 1785. No. 989.—*Vide annotations to Adding. P. S. p.* 272. *N. B.* No *certiorari* lies upon this statute. *Cowper* 24.

† *Stat.* 8. It is also enacted by 16 Car. 2. c. 7. "That if any person shall by any fraud, unlawful device, or other ill practice in playing at cards, dice, tables, tennis, bowls, skittles, shovelboard; or by cock-fighting, horse-racing, dog-matches, foot-races, or other pastimes, or games, or by bearing a share in the stakes, or by betting on the side of such as shall play, act, ride, or run as aforesaid, win any sum or other valuable thing, he shall forfeit treble the value in the manner the act directs." 2 *Abr. Eq.* Caf. 184. *Slierfin* 344. 1 *Levinz* 244. *Ld. Raym.* 69. 2 *Levinz* 44. 4 *Com. Dig.* 70.

† *Stat.* 9. It is also further enacted by 9 Ann c. 14. "That if any person shall by any fraud or shift, cozenage, circumvention, deceit or unlawful device, or ill practice whatsoever, in playing at cards, dice, tables, tennis, bowls, or any the games aforesaid, or bearing a share in the stakes, or betting on the sides of such as do play, win any sum of money, or other valuable thing, on conviction by information or indictment, he shall forfeit to such as shall sue for the same, five times the value, he deemed infamous, and suffer corporal punishment as in cases of perjury." *Vide Strange* 1048. *The King v. Lookup*, where it was determined that the court cannot set a fine upon the offender on a conviction upon this act; that the only judgment they can give is, *that he is convicted, &c.*

CHAPTER THE SEVENTY-SECOND.

OF CONSPIRACY.

FOR the better understanding the nature of Conspiracy, I shall consider who may be said to be guilty of it, and in what manner such offenders are to be punished.

2 Inst. 562.
Reg. 134. a. 135
Godb. 444.

Sec. 1. As to the first point, there can be no better rule than the statute of 33, or rather 21 Edw. 1. the intent whereof was to make a final definition of conspirators, to which purpose it declareth, "That conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas, and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprizes; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, who by their seigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other parties than such as touch the estate of their lords or themselves."

1. Ray. 1169.
2 Mod. 321.
Burr. 930. 994.
3 Comm. 570.

Sec. 2. From this definition of conspirators it seems clearly to follow, That not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. For the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution thereof or not. And if such a confederacy be within the letter of the statute, there seems to no manner of reason to say, That they are not also within the meaning of it, since it is a high contempt of the law, barely to engage in such an association to abuse it, to serve the purposes of oppression and injustice. Neither can it be a severe construction which will bring a crime so evidently contrary to the first principles of common honesty, within the meaning of a law, the words whereof do plainly seem to extend to it.

And therefore I cannot but question the accuracy of that description of conspiracy which is given in the third Institute, whereby the lawful acquittal of the party grieved is required to make the offenders guilty of this crime. It is true indeed, That a bare conspiracy to indict a man will not maintain a writ of conspiracy at the suit of the party grieved, because it doth not do him any actual damage. Also it must be confessed, That it is often laid down as a general rule, and taken for granted, That no such conspiracy is a good foundation for such a writ, unless the plaintiff be lawfully acquitted. And it is certain, That there is no formed writ of conspiracy in the register for a malicious indictment or appeal; but what supposes such indictment or appeal to have been actually brought, and the party to have been legally discharged. From whence it follows, That no one can have the benefit of any such writ in the register, who upon a false accusation, is put to the trouble and vexation of being apprehended, examined, or committed, &c. without being ever indicted or appealed. However it is certain, That an acquittal by verdict is not always necessary to maintain such a writ, for it appears by the register itself that where one brought such a writ in the usual form, having it in the words *quousque acquietatus fuisset*, &c. against one who had been non-suited in a malicious appeal of felony brought against him, his writ was abated, because such a non-suit would not make good the words *quousque acquietatus fuisset*, and yet he afterwards brought a new writ, wherein he used the words *quietus recessit*, instead of *acquietatus fuisset*, and recovered. And why may not a new writ as well be formed in any other case, which is as much within the mischief of the statute as this? Or what colour can there be to say, That the malicious putting of a man to the unreasonable charge, scandal, and trouble, of a criminal prosecution, which is so palpably groundless, as not to have probability enough to induce a grand jury to find an indictment, should not be as good a foundation of complaint, and a grievance as much within the meaning of the statute, as the putting one to the charge and vexation of a groundless action, either in a temporal or spiritual court, for which it appears by the (a) register, That a writ of conspiracy doth lie without making use either of the words *acquietatus fuisset*, or *quietus recessit*? Neither can it be said, That the opinion I contend is wholly unsupported by authority, as appears from the Poulterer's case in (b) Coke's ninth report.

However since it is certain, That an (c) action on the case in the nature of such writ doth lie for a false and malicious prosecution, for any crime, whether capital, or not capital, though it doth not proceed to an actual indictment, or appeal, and that the same damages may be recovered in such action as in a writ of conspiracy, it hath been thought needless to inquire, whether such writ may be maintained for such

3 Inst. 143.
 Ld. Ray. 378.
 10 Mod. 219.
 F. N. B. 114.
 1 Dan. Abr. 215,
 213.
 S. P. C. 173,
 174, 175.
 B. Corone 89.
 B. Appeal 68.
 1 R. Abr. 110,
 111, 114.
 9 Co. 50, 57.
 Register 134.
 1 Jon. 93, 94.
 Saikeld 21.
 6 Modern 261.
 Bull N. P. 14.
 10 Modern 219.
 B. Corone 6.
 33 H. 5 1.
 See S. P. C. 174.
 Vide 2 Inst.
 407, 562.
 1 Ventris 47.

(a) Regist. 134.
 F. N. B. 116.
 Finch 305.
 2 Inst. 562.
 1 Keb. 234.
 (b) 9 Co. 56.

(c) 1 J'm. 93,
 94.
 1 Leam. 107.
 C. Eliz. 70, 134.
 Palm 315.
 C. Jac. 130,
 157, 490.
 March 79.
 C. Cal. 15.

a pro-

2 Roll. 256, 237. a prosecution or not. But howsoever the law may stand in relation to writs of conspiracy, there seems to be no manner of reason, that the stated form of such writs should any way restrain a proceeding by way of indictment or information against persons which are apparently within both the letter and meaning of the statute. (1)
 2 Bullst. 270, 271.
 1 Roll. 109.
 1 R. Ab. 112, 213.
 Ray 135, 180.
 Con. 1 Bullst. 185.
 Yelv. 116. Hutt. 49. C. Eliz. 563. 9 Co. 57. 563. 9 Co. 57. 5 Mod. 394, 4995. 1 Salkeld, 13. Davy. 208. Strange 691.. 1 Ray 374. Bull N. P. 14. Holt. 4, 150.

(1) In an action for a malicious prosecution, it is incumbent on the plaintiff to shew that the original suit, wheresoever instituted, is at an end. For otherwise he might recover in the action, and afterwards be convicted upon the original suit. Douglas 205. For this purpose he must produce and prove, a copy of the acquittal on record, the substance of the evidence, the charges of acquittal, and the circumstances which shew the prosecution was malicious and without probable cause. Bull Nisi Prius, 13, 14.

(d) 1 Lev. 62, 126. Also it seems certain, That a man may not only be condemned to the pillory, but also to be branded for a false and malicious accusation, but since it doth not appear to have been solemnly resolved, that such an offender is indictable upon the statute, it seems to be more safe and adviseable to ground an indictment of this kind upon the common law, than upon the statute, since there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate (d) together by indirect means to impoverish a third person, or (e) or falsely and maliciously to charge a man with being the reputed father of (f) a bastard child, or to maintain one another in any matter, whether it be true or false. (2)
 1 Sid. 174.
 1 Keble 350.
 (e) 1 Lev. 62.
 1 Mod. 185, 186.
 1 Sid. 68.
 1 Keble 254.
 (f) 27 Aff. 44.
 9 Co. 56.
 3 R. Abr. 77.
 See Moor 788.
 Salkeld 174.
 1 Ventris 303, 304.
 6 Mod. 185.
 8 Mod. 320.
 11 Mod. 55.
 Carth. 416. Foster 221.

(2) Journeymen confederating and refusing to work unless for certain wages may be indicted for a conspiracy, notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution, for the offence consists in the conspiring, and not in the refusal, and all conspiracies are illegal although the subject matter of them may be lawful. Vide the case of the Tub-women v. the London Brewers. 8 Mod. 11. 320. So also a bare conspiracy to do a lawful act to an unlawful end is a crime, although no act be done in consequence thereof. 8 Mod. 321. And the fact of conspiring need not be proved on the trial, but may be collected by the jury from collateral circumstances. 1 Black. Rep. 392. Strange 144. And if the parties concur in doing the act, although they were not previously acquainted with each other, it is conspiracy. Lord Mansfield in the case of the prisoners in the King's Bench. Hillary Term. 26 Geo. 3.

Sett. 3. Neither doth it seem to be any justification of a confederacy to carry on a false and malicious prosecution, That the indictment or appeal, which was preferred, or intended to be preferred, in pursuance of it, was (g) insufficient, or that the court wherein the prosecution was carried on, or designed to be carried on, had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was in truth in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy

(g) Palm. 45.
 3 Keble 141.
 Style 157.
 1 R. Abr. 110.
 9 Coke 26.
 Yelv. 46, 117.
 C. Eliz. 563.
 2 Bullst. 270, 271.
 Cro. Jac. 357.
 1 H. 4. 39.

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racy is formed, may perhaps be inconsiderable; (b) yet the association to pervert the law in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law.

(b) Reg. 134.
F. N. B. 116.
3 Affize 13.
11 H. 7. 25, 26.
1 R. Abr. 112.
2 Mod. 52, 326.

Con. 2 Keb. 881. W. Jones 94. 2 Cr. 130. Vide the case of the King v. Rispal. 1 Black. Rep. 368. Burr. 1320.

Self. 4. Neither (a) is it any plea for one who is prosecuted for such an unlawful confederacy, That nothing more was intended by him, but only to give his testimony in a legal course of justice against the party to whose prejudice such confederacy is supposed to have been formed; for notwithstanding it may be said, That it would be a great discouragement to legal proceedings to make persons liable to a criminal prosecution, for barely intending to give their evidence, and it would be a pre-judging of a cause to try the truth of the testimony intended to be given in it before the cause itself is determined; yet the law will rather venture this mischief, than suffer so flagrant a villainy to go unpunished. However if there be any probability, That the principal cause will ever be tried, it seems proper to apply to the court to stay the trial of the confederacy till the merits of the principal cause be determined.

(a) 9 Co. 55.
56, 57.
12 Co. 23, 90,
91, 92.
C. Eliz. 70, 71.
134.
1 Leon. 107.
1 R. Abr. 113.
114, 115.
Winch. 28, 54.
Latch 79, 80.
Con. 1 R. Abr.
10.
F. N. B. 115.
27 H. 8. 2.

Self. 5. Yet (b) it seems to be certain, That no one is liable to any prosecution whatsoever, in respect of any verdict given by him in a criminal matter, either upon a grand or petit jury. For since the safety of the innocent, and punishment of the guilty, doth so much depend upon the fair and upright proceeding of jurors, it is of the utmost consequence, that they should be as little as possible under the influence of any passion whatsoever. And therefore, lest they should be biassed with the fear of being harrassed by a vexatious suit, for acting according to their consciences, (the danger of which might easily be insinuated, where powerful men are warmly engaged in a cause, and thoroughly prepossessed of the justice of the side which they espouse) the law will not leave any possibility for a prosecution of this kind.

(b) 27 Aff. 77.
27 Aff. 12.
9 H. 6. 44.
Bridg. 130, 131.
21 E. 3. 17.
47 E. 3. 17.
12 Co. 23, 24.
Reg. 134.
F. N. B. 115.
27 H. 8. 2.
S. P. C. 172,
173.
L. Ray. 469.
12 Co. 23, 24.
Vaugh. 135.

It is true indeed, the jurors were formerly sometimes questioned in the Star-Chamber, for their partiality in finding a manifest offender not guilty; but this was always thought a very great grievance; and surely as the law is now settled by Bushel's case, there is no kind of proceeding against jurors in respect of their verdicts in criminal matters allowed of at this day. As to the objection, That an attaint lies against a jury for a false verdict in a civil cause, and that there is as much reason to allow of it in a criminal one, it may be answered, That in an attaint, a man's property is only brought into question

F. N. B. 103.
105.

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a second time, and not his liberty or life; and also it may be generally presumed, That a jury is likely to be equally influenced with the fear of an attain from either of the contending parties, whereas if any such examinations of their proceedings were allowed in criminal causes they might be often in great danger of one side, by incurring the resentment of a powerful prosecutor, and provoking him to call their conduct into question for their supposed partiality; but they could have little to fear from an injured criminal who would seldom be in circumstances to make his prosecution formidable.

12 Coke 24.
See Vaugh. 128,
139.
22 Ed. 4. 18.
21 Ed. 4. 67.
S. P. C. 173.

Sett. 6. And as the law has exempted jurors from the danger of incurring any punishment in respect of their verdict in criminal causes, it hath also freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for any thing done by them openly in such courts as judges. For the authority of a government cannot be maintained, unless the greatest credit be given to those who are so highly intrusted with the administration of publick justice; and it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigour and success, if they should be continually exposed to the prosecutions of those whose partiality to their own causes would induce them to think themselves injured. Yet if a judge will so far forget the dignity and honour of his post, as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses, or labour jurors, he hath no reason to complain, if he be dealt with according to the same capacity, to which he so basely degrades himself.

12 Co. 24.

Carth. 416.
1 R. Abr. 107,
112, 112, 115.
L. Cor. 89.

S. P. C. 173.
22 Aff. 77.

Sett. 7. It appears not only from the words of the statute, but also from the plain reason of the thing, That no confederacy whatsoever to maintain a suit can come within the danger of the statute, unless it be both false and malicious. For it would be a most dangerous discouragement of all legal prosecutions, if those who engage in them upon a probable ground, should be in danger of being found guilty of so heinous a crime upon their not being able to bring their suits to their intended effect. And from hence it clearly follows, That if the defendants to an indictment or appeal in murder be found guilty of homicide *se defendendo*, or by misadventure, or get off by pleading the king's pardon, their prosecutors are in no danger of being punished as conspirators. And from the same ground it also follows, That if the defendants in a writ of conspiracy can shew a probable cause of suspicion, they shall be discharged; as where being accused of a conspiracy for indicting a person of larceny, they can shew

shew that a larceny was committed at such a time and place, and that the party charged by them for such larceny was found by them at the same time and place, with suspicious circumstances; or where persons being charged with a conspiracy for indicting another for feloniously carrying away a woman with great violence, and numbers are able to prove that they saw the persons whom they so accused riding armed in a warlike manner, and following after those who in truth actually did the felony, and that it was the common report of the country that they were all of the company. But some have said, That there is a necessity to plead such matter specially, and that it cannot be given in evidence on the general issue.

1 Leon. 107.
C. Eliz. 134.
Kelw. 81, 83.
20 H. 7. 11.

20 H. 7. 11.
Kelw. 81.
C. Eliz. 134.
1 Leon. 107.

Sett. 8. It plainly appears from the words of the statute, That one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows, That if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the (d) acquittal of the rest is the acquittal of that one also. Also upon the same ground it hath been holden, That no such prosecution is maintainable against a (b) husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will.

12 Mod. 203.
(a) 3 H. 4. 6.
28 Aff. 12.
S. P. C. 173.
C. Eliz. 701.
5 Mod. 222.
1 R. Abr. 111.
(b) 38 Ed. 3. 3.
S. P. C. 174.

But it is certain, That an action on the (c) case in the nature of a conspiracy may be brought against one only. Also (d) it hath been resolved, That if such an action be brought against several persons, and all but one to be acquitted, yet judgment may be given against that one only.

(c) Carth. 416.
1 R. Abr. 111.
112.
F. N. B. 116.
C. Jac. 194.
C. Car. 239.
3 Mod. 220.
176, 180. 2 Kelw.
12 Mod. 209.

(d) 1 R. Abr. 111. 112. C. Eliz. 701. 6 Mod. 170. 1 Saund. 228. Ray. 497. Str. 144, 193, 1227. 1. Wilf. 210. 5 Mod. 403. Latch 80, 262. Buller N. P. 14.

Sett. 9. As to the second point, *viz.* In what manner offenders of this nature are to be punished, it is clear, That those who are convicted of conspiracy at the suit of the (e) party shall only have judgment of fine and imprisonment, and to render to the plaintiff his damages. Also it is certain, that he who is convicted at the suit of the (f) king, of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law, (whereby he is disabled to be put upon any jury, or to be sworn as a witness, or even to appear in person in any of the king's courts;) and also that his houses, lands, and goods, shall be seized in the king's hands, and his houses and lands stripped and wasted, his trees rooted up and rased, and his body imprisoned. And this is commonly called a villainous judgment, and is given by the common law, and not by any statute, as is said generally in some (g) books,

(e) 24 Ed. 3.
34 b.
3 Inst. 143.
2 Inst. 353.
562.
S. P. C. 175.
(f) 24 Ed. 3. 34.
12 Mod. 209.
F. N. B. 116.
3 Inst. 143.
2 Inst. 562.
S. P. C. 173.
27 Affize 59.
Carth. 416.

(g) See the books
above cited.

27 *Ad.* 59. to be the proper judgment upon every conviction of conspiracy at the suit of the king, without any restriction to such as endangered the life of the party. But I do not find this point any where settled. (3)

(3) There has been no instance of the villainous judgment since the reign of Edward the Third. The usual mode of punishment at present is by pillory, fine, imprisonment, and surety for the good behaviour. *Burr.* 996, 1027. *Str.* 196. *Crown Cir.* 208. The quarter sessions have jurisdiction over this offence. *Finch* 80. 8 *Mod.* 321. And on motion in arrest of judgment the defendant must be personally present in court. *Strange* 1227. *Burr.* 931.

CHAPTER THE SEVENTY-THIRD.

OF LIBELS.

See 3 *Inst.* 174. **I**N treating of Libels I shall consider; First, What shall be said to be a libel. Secondly, Who are liable to be punished for it. Thirdly, In what manner they are to be punished.

9 *Co.* 53, 59. *Moor* 813, 627. *March* 131. 4 *Co.* 14. *Popham* 133, 139. *Selden* tit. libels. 1 *Ventris* 31. *Hob.* 253. *Carth.* 405. 1 *Salk.* 211. *Fitzgib.* 121, 253. 2 *Wilfon* 403. 2 *Burr.* 980.

3 *Coke* 125. *Sett.* 1. As to the first point it seemeth, That a libel in a strict sense is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to publick hatred, contempt or ridicule. 5 *Mod.* 165, 266, 767. *Salk.* 418. *Str.* 422, 791. 12 *Mod.* 221. *Ld. Ray* 416. 12 *Mod.* 2193.

5 *Coke* 125. *Sett.* 2. But it is said, That in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner. *Skin.* 123, 124. *Salkeld* 418. *Ld. Ray* 411. 3 *Keb.* 378.

1 *Lev.* 139. *Sett.* 3. And since the chief cause for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of publick peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from publick justice for injuries of this kind, which of all others are most sensibly felt; and since the plain meaning of such scandal as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking, as that which is expressed by writing or printing, why should it not be equally criminal?

Sett.

Sec. 4. And from the same ground it seemeth clearly to follow, That such scandal as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing in a taunting manner reckoning up several acts of publick charity done by one, says, "You will not play the Jew, nor the hypocrite," and so goes on in a strain of ridicule to insinuate, that what he did was owing to his vain-glory; or, where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities only which their enemies charge them with the want of; as by proposing such a one to be imitated for his courage, who is known to be a great statesman but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so.

Hobart 215.
Popham 129.
2 Wilson 403.
2 Burrow 920.
2 Modern 119.
4 Modern 86.
4 Read. Stat.
Law 151.
Barn. 305, 289.
Sess. Cases 30.
Popham 252.
Hobart 215.
Keble 293.
Moor 627.
R. Abr. 37.
Fitzg. 121.
2 Strange 898.

Sec. 5. And from the same foundation it hath also been resolved, (a) That a defamatory writing expressing only one or two letters of a name, in such a manner, that from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: and it is a ridiculous absurdity to say, That a writing which is understood (b) by every the meanest capacity, cannot possibly be understood by a judge and jury.

(a) *Hurt's Case*.
Trin. 12
Ann.
3 Modern 68.
12 Modern 139.
Ld. Raym. 879.

(b) On application for an information some friend to the party complaining,

should by affidavit state the having read the libel, and that he understands and believes it to mean the party. Note in 3 Bac. Abr. 493.

Sec. 6. And from the same ground it farther doth appear, That it is far from being a justification of a libel, that the contents thereof are true, (1) or that the person upon whom it is made, had a bad reputation, since the greater appearance there is of truth in any malicious invective, so much the more provoking it is.

5 Coke 125.
Hobart 253.
Moor 627.
Strange 498.
3 Bacon 495.
9 St. Tr. 275.

(1) In an action, the truth of a libel may be pleaded in justification. Hob. 253. And even on a motion for an information, the truth or falsehood of the libelous matter will considerably influence the court either to refuse or to grant it. Stra. 498. An affidavit therefore, except in particular cases, is always required from the party applying, stating positively and directly that the contents of the imputed libel are not true. Dougl. 282, 383. Or the court will leave the injury to be remedied in the ordinary course of justice by action or indictment. Stra. 498.—But the court will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be considered

to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor, to vindicate the common right or all; though violated only in the person of an individual; for the malicious publication of even truth itself cannot in true policy be suffered, to interrupt the tranquillity of any well ordered society.—This is a principle so rational and pure that it cannot be tainted by the vulgar odium which has accompanied the derivation of the doctrine from the tyranny of the Star-Chamber; the adoption of it by the worst of courts can never weaken its authority, and without it all the comforts of society might with impunity be hourly endangered or destroyed.—Vide Law of Libels.

5 Coke 125.
1 Sid. 219, 271.
3 Inst. 174.
Cro. Car. 175,
504.
2 Roll. 86.
3 Mod. 139.
Comb. 65.
Carth. 15.
Hard. 470.
Skin. 123.
Keb. 773.
5 L. Tr. 2977.

Sec. 7. Nor can there be any doubt but that a writing which defames private persons only, is as much a libel as that which defames persons intrusted with a publick capacity, inasmuch as it manifestly tends to create ill blood, and to cause a disturbance of the publick peace. However it is certain, That it is a very high aggravation of a libel that it tends to scandalize the government, by reflecting on those who are intrusted with the administration of publick affairs, which doth not only endanger the publick peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition.

(a) Hardres 470
1 Lev. 240.
1 Sid. 414, 415.
1 Saund. 131.
2 Keb. 832.
(b) 4 Coke 14.
(c) Dyer 285.
2 Inst. 228.
Bull. N. P. 6.
Moor 627.

Sec. 8. But it hath been resolved, That no false or scandalous matter contained in (a) petition to a committee of parliament, or in (b) articles of the peace exhibited to justices of peace, or in any other (c) proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutions, in respect of their applications to a court of justice. And the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them. Also (d) it seemeth to have been holden by some, That no want of jurisdiction in the court, to which such a complaint shall be exhibited, will make it a libel, because the mistake of the proper court is not imputable to the party, but to his counsel. Yet if it shall manifestly appear from the whole circumstances of the case, That a prosecution is intirely false, malicious, and groundless, and commenced, not with a design to go through with it, but only to expole the defendant's character under the shew of a legal proceeding; I cannot see any reason why such a mockery of publick justice should not rather aggravate the offence, than make it cease to be one, and make such scandal a good ground of an indictment at the suit of the king; as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party, whether the court had a jurisdiction of the cause or not. But it is said, that no

(d) 2 Keb. 832.
2 Inst. 228.
2 And. 28.
Moor 143, 705,
820.
Popham 122.
Con. 4 Co. 14.
4 Com. D. 8. 152
Dyer 285.
Ylverton 117.
2 Bull. 269.
Godbolt 340.
Palm 145, 180.
Vent. 23.
12 Coke 103.
2 Modern 129.
2 An. 28.

prosecution

presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence any way to discourage them from making their inquiries with that freedom and readiness which the publick good requires. For which considerations, it seems reasonable to exempt them from the fear of any kind of prosecution in respect of their inquiries, as has been shewn more at large in the chapter of conspiracy.

See 1 Danv.
Abr. 208, 209,
210, 211. and
the foregoing
Chapter of
Conspiracy.

Moor 627

Sec. 9. However it seems clear, That no writing whatsoever is to be esteemed a libel, unless it reflect upon some particular person; and it seems, That a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law, as I have heard it agreed in the Court of King's Bench; (2) yet it seems, That the author may be bound to his good behaviour, as a scandalous person of evil fame.

Kely 238.
Salk. 224.
Ld. Ray. 486.
4 Read S. L.
151.
Forbes. 98.
Salk. Ca. 29.
12 Mod. 139.
218, 220.
L. Ray. 879.
2 Strange 934.
1 Vent. 10, 161

Bar. K. B. 138, 166. See the Chapter concerning Surety for the good Behaviour.

(2) It was so agreed in Read's case, 11 Mod. 142; But in the case of the King v. Curl, Mich. 71 Geo. 2. for publishing an obscene book, the Court were unanimous, that it is a temporal offence, and that Read's case was not law. Stra. 788, 834. Vide also 4 Burr. 2527.

Sec. 10. As to the second point, viz. Who are liable to be punished for a libel, it is certain that not only he who composes, or procures another to compose it, but also that he who publishes, or procures another to publish it, are in danger of being punished for it; and it is said, not to be material whether he who disperses a libel knew any thing of the contents or effect of it or not; for nothing could be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him (3) safe in dispersing them. Also it hath been said, That if he who hath either read a libel himself, or hath heard it read by another, do afterward maliciously read or repeat any part of it, in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. Also it hath been holden, That the copying of a libel shall be a conclusive evidence of the publication of it, unless the party can prove that he delivered it to a magistrate to examine it, in which case the act subse-

Almon's case.
5 Bur. 2665.
9 Co. 59.
Moor 267, 627,
813.
Strange 77.
Bull N. P. 6.
Fitzgibbon 47.
Con. 9 Co. 59.
L. Ray. 414,
417, 729.
4 Com. Dig.
152. B. 2.
5 Co. 125.
12 Co. 35.
Comb. 359.
5 Mod. 167,
163.
Vide Salk. 417,
418, 419, 646,
281.
Carthew 405 &
410.

(3) But if a printer is confined in prison, to which his servants have no access, and they publish a libel without his privity, the publication of it shall not be imputed to him. Woodfall's case. Essay on Libels. p. 18. See. Vide Salmon's case, B. R. Hilary 1777, and Rex v. Almon. 5 Burr. 2657.

quent is said to explain the intention precedent. But it seems to be the better opinion, That he who first writes a libel dictated by another, is thereby guilty of making it, and consequently punishable for the bare writing; for it was no libel till it was reduced to writing.

(a) 1 Keb. 931.
2 Keb. 261, 58.
L. Ray. 341,
417, 486.
Skin. 123.
12 Mod. 218.
11 Mod. 97.
3 Bac. Ab. 498.
1 Lev. 139,
240.
12 Co. 34.
Pop. 139, 136.
Ray. 201. 1 Sid. 270, 444.
(b) 5 Mod. 167. 9 Co. 59. 1 Keb. 832. 12 Co. 35. See Fitzg. 47. 12 Vin. Ab. 229.
Barn. 306. Scff. Ca. 33.

Scff. 11. Also it hath been resolved, (a) That the sending of a letter full of provoking language to another, without publishing it, is highly punishable; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden in some (b) books, surely the sending of it to the party reflected upon, must be a much greater crime, inasmuch as it so manifestly tends to a disturbance of the peace.

Keb. 832.
1 Saund. 133.
1 Lev. 240.
1 Sid. 414, 415.

Scff. 12. Also it seems to be agreed, That he who delivers a paper full of reflections on any person, in nature of a petition to a Committee of Parliament, to any other person except the Members of Parliament, may be punished as the publisher of a libel, in respect of such a dispersing thereof among those who have nothing to do with it.

(c) 9 Co. 59.
Moore 813.

(d) 9 Co. 59.
Moore 813.
(e) Moore 627.
1 Vent 31.
2 Keb. 501.
Salk. 418.
Carth. 409.

Scff. 13. But it hath been resolved, That he who barely reads a libel in the presence (c) of another, without knowing it before to be a libel, or who hearing a libel read by another (d) laughs at it, or who (e) barely says, That such a libel is made upon such a person, whether he speak it with or without malice, or who is only proved to have had a libel in his custody, shall not in respect of any such act be adjudged the publisher of it. But the having in one's custody a written copy of a libel publickly known, is an evidence of the publication of it.

Moore 627.
9 Co. 59.

Scff. 14. Also it hath been holden, That he who repeats part of a libel in merriment without malice, and with no purpose of defamation, is no way punishable; but it seemeth, That the reasonableness of this opinion may justly be questioned; for jests of this kind are not to be endured, and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.

15 Vin. Ab. 88.
1 Keb. 832.
1 Saund. 133.
1 Levinz. 240.
1 Sid. 414, 415.
Skin. 124.
Hard. 470.

Scff. 15. But it seemeth to be settled, that the bare printing of a petition to a committee of parliament (which would be a libel against the party complained of, if it were made for any other purpose, than as a complaint in a course of justice) and

and delivering copies thereof to the members of the committee, shall not be looked upon as the publication of a libel, inasmuch as it is justified by the order and course of proceedings in parliament, whereof the King's Courts will take judicial notice.

Sett. 16. As to the third point, viz. In what manner offenders of this kind are to be punished, there seemeth to be no doubt, but that they may be condemned to pay such fine, and also to suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender.

Cro. Car. 175.
504.
3 *Inst.* 174.
2 *Inst.* 228.
12 *Co.* 134.
Str. 934.
3 *Mud.* 178.
Fortes. 37, 201.

CHAPTER THE SEVENTY-FOURTH.

OF THE OFFENCE OF KEEPING A BAWDY-HOUSE,

O R

† AN UNLICENSED PLACE OF ENTERTAINMENT.

THE offence of keeping a bawdy house being of so gross a nature, and there being also so few questions relating to it worth considering, I shall pass it over with these following observations. First, That it comes under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the publick peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. Secondly, That a femercovert is punishable for this offence (1) as much as if she were sole, as more fully hath been shewn, Chapter the first, Section twelve. Thirdly, That a lodger who keeps only a single room for the use of bawdry, is indictable for keeping a bawdy-house; but that the bare solicitation of chastity is not indictable. Fourthly, That offenders of this kind are punishable not only with fine and imprisonment, but also with such infamous punishment as to the court in discretion, shall seem proper.

2 *Rol.* 39. 79.
83.
4 *Blac. Com.*
29. 64. 167.
3 *Burn.* 95.
2 *Ecc. Law.*
Kitchen 11.
3 *Inst.* 205.
Salk. 382.
2 *Ld. Ray.* 1197.
Dalt. p. 262.
Popham 208.
1 *Sid.* 168, 410.
2 *Burr.* 1232.
Salk. 384.
10 *Mud.* 63
336.

(1) Therefore she may have an action for saying that she keeps a bawdy-house. *Sayer* 33.

† *Sett.* 2. As to the offence of keeping an unlicensed house. It is enacted by 25 Geo. 2. c. 36. made perpetual by 28 Geo.

A 2 3

2. c. 19.

Publick places within 20 miles of the metropolis must be licenced.

2. c. 19. " That any house, room, garden, or other place kept for publick dancing, musick, or other publick entertainment of the like kind within the cities of *London* and *Westminster*, or within twenty miles thereof, without a licence had for that purpose from the last preceding Michaelmas quarter sessions of the peace, for the county or place, in which such house, room, garden or other place is situate, as the justices in their discretion shall think fit, signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place."

The form of such licence.

† Sect. 3. And it is further enacted, " That every such licence shall be signed and sealed by the said justices in open court, and afterwards be publickly read by the clerk of the peace, together with the names of the justices subscribing the same; and no such licence shall be granted at any adjourned sessions; nor shall any fee or reward be taken for any such licence. And it shall be lawful for any constable or other person authorized by warrant, by a justice of the county or place where such house or place shall be situate, to enter such house or place, and to seize every person who shall be found therein, in order that they may be dealt with according to law. And every person keeping such house, room, garden, or other place, without licence as aforesaid, shall forfeit one hundred pounds to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses."

How places so licenced are to be distinguished,

† Sect. 4. And it is further enacted, " That there shall be affixed and kept up in some notorious place over the door or entrance of every such house or other place, so licenced as aforesaid, an inscription in large capital letters, in the words following. LICENCED PURSUANT TO ACT OF PARLIAMENT OF THE TWENTY-FIFTH OF KING GEORGE THE SECOND; and that no such house, room, garden, or other place, kept for any of the said purposes, although licenced as aforesaid, shall be open for any of the said purposes before five in the afternoon, and that these restrictions shall be inserted in and made condition of the licence, which shall be forfeited on the breach thereof, and revoked by the next general or quarter session, and not be renewed; nor shall any new licence be granted to the same person or persons, or any other person on his or their or any of their behalf, or for their use or benefit, directly or indirectly, for keeping any such house, room, garden, or other place, for any of the purposes aforesaid."

N B. This act shall not extend to the theatres royal, nor to any publick entertainments authorized by letters patent from the crown or licence from the Lord Chamberlain. Sect. 6.

† Sect. 5. And it is enacted by par. 5. " That, in order to encourage prosecutions against persons keeping bawdy-houses,

“ houses, gaming-houses, or other disorderly houses, if any
 “ two inhabitants of any parish or place paying scot and lot
 “ therein, do give notice in writing to the constable, or where
 “ there is no constable, to any other peace officer of such
 “ parish or place of the like nature, of any person keeping a
 “ bawdy-house, gaming-house, or other disorderly house
 “ within the parish or place, he shall forthwith go, with such
 “ inhabitants to a justice of the county or place, and upon
 “ such inhabitants making oath before such justice that they
 “ believe the contents of such notice are rue, and entering
 “ into a recognizance of 20l. each to give material evidence
 “ against the offender, he the said constable shall enter into a
 “ recognizance of 30l. to prosecute such suit with effect at
 “ the next sessions or assizes for the county, as to such justice
 “ shall seem meet. And such constable or other officer shall
 “ be allowed his reasonable expences, to be ascertained by
 “ two justices, and paid by the overseers. And in case the
 “ offender shall be convicted, the owners shall immediately
 “ pay ten pound to each of the inhabitants, on pain of for-
 “ feiting in each case double the sum. And if the constable
 “ shall neglect his duty he shall forfeit 20l.

The mode of
prosecution.

† *Sec. 6.* And it is further enacted by par. 6. “ That upon
 “ such constable or other officer entering into such recog-
 “ nizance to prosecute as aforesaid, the said justice shall, by
 “ warrant, bring the person accused before him, and bind him
 “ over to appear at the session or assizes as aforesaid, and if he
 “ thinks fit, may likewise demand and take security for such
 “ person’s good behaviour in the mean time.

Justices may
summon the
party, &c.

† *Sec. 7.* And it is further enacted, par. 8. “ That every
 “ person who shall appear, act, or behave, as having the care
 “ and management of any such house, shall be deemed the
 “ keeper of the same, and liable to be punished as the master
 “ or mistress, although not in fact the real owner or keeper
 “ thereof. Inhabitants may be witnesses. The indictment
 “ not removeable by *certiorari*.”

Who shall be
deemed keepers
of publick
places.

CHAPTER THE SEVENTY-FIFTH.

OF COMMON NUSANCES.

OFFENCES under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace, which may be committed by private persons without any relation to an office, and which are of an inferior nature to the six kinds of offences last treated of, being neither infamous nor grossly scandalous, seem to be reducible to the following heads; First, Such as more immediately affect the publick. Secondly, such as more immediately affect the interests of particular persons.

Offences of this kind, more immediately affecting the publick, are four-fold; viz. Common nuisances. Monopolies. Forestalling, ingrossing, and regrating. And Barratry.

And first of common nuisances. For the better understanding whereof I shall first consider them in general, and then descend to those relating to highways and publick routes, which seem to be the most remarkable general heads of this offence.

As to common nuisances in general I shall consider, *First*, What shall be said to be a common nuisance. *Secondly*, How it may be removed. *Thirdly*, How it may be punished.

Sect. 1. As to the first point it seems, That a common nuisance may be defined to be an offence against the publick, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires.

Sect. 2. But annoyances to the interest of particular persons are not punishable by a publick prosecution as common nuisances, but are left to be redressed by the private actions of the parties aggrieved by them.

Sect. 3. And from hence it clearly follows, That no indictment for a nuisance can be good, which lays it to the damage of private persons only; as where it accuses a man of
(a) fur-

2 R. Abr. 83.

1 R. Abr. 83.
Co. Litt. 7. 56.

1 Sid. 209.
Sayer 169.

(a) surcharging such a common; or of (b) inclosing such a piece of ground, wherein the inhabitants of such a town have a right of common, to the nuisance of all the inhabitants of such a town; or of disturbing a (c) water-course running to the mill of *J. S. ad grave damnum J. S. & tenentium suorum*, without saying *omnium ligeorum Domini Regis*; or of doing a nuisance to a thing no way appearing to be of a publick nature, *ad grave* (d) *damnum*, or (e) *detrimentum*, or (f) *commune nocumentum omnium ligeorum Domini Regis prope inhabitantium*; yet it hath been resolved, that an indictment for not repairing a bridge by reason whereof it was ruinous, *ita quod ligei Domini Regis per eam transire non possunt*, and concluding, *ad nocumentum eorundem*, is good without using the words *ad nocumentum omnium ligeorum*, &c. for by the king's liege people shall be understood, all his liege people.

(a) 2 R. Ab. 83.
1 Burr. 259.
6 Modern 453.
2 Wilson 37.
(b) 27 Aff. 6.
2 R. Abr. 83.
C. Eliz. 90.
(c) 2 R. Ab. 83.
1 Vent. 26.
(d) 2 R. Ab. 83.
(e) 1 Mod. 107.
(f) 1 Roll. 406.
3 Keb. 28, 284.
C. Eliz. 414.
C. Jac. 382.
1 Saunders. 135.
C. Eliz. 148.
2 Keble 461.
2 Leon. 183, 184.
9 Coke 113.
1 Ventris 208.

SECT. 4. Also it is said, That the law hath so tender a regard for the interest of the king and of religion, That an indictment for doing a thing which plainly appears immediately to tend to the prejudice of either of them, is good, though it does not expressly complain of it as a common grievance; and upon this ground it hath been resolved, That an indictment for converting the king's money to one's own use is good, without more. And upon the same foundation also it hath been holden, That an indictment for breaking and digging up the wall of the church of such a town, *ad nocumentum burgi ligeorum Domini Regis* is good.

27 Aff. 19, 20.
2 R. Abr. 83.
84.

SECT. 5. Also it hath been said, That an indictment of a common scold, by the words *communis rixatrix*, which seem to be precisely necessary in every indictment of this kind, is good, though it conclude *ad commune nocumentum diversorum* instead of *omnium*, &c. perhaps for this reason, because a common scold cannot but be a common nuisance. And upon the like ground it seems that it may probably be argued, That an indictment for laying logs in the stream of a navigable publick river, *ad nocumentum J. S.* may be maintained, because, it cannot but be a common nuisance. And if the law be so in this case, why should not also an indictment setting forth a nuisance to a way, and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude *in nocumentum diversorum ligeorum*, &c. without saying *omnium*; for why should such a conclusion be more necessary in an indictment for one kind of nuisance than for any other? And perhaps the (g) authorities which seem to contradict this opinion, might go upon this reason, that in the body of the indictment, it did not appear with sufficient certainty, whether the way, wherein the nuisance was alledged,

6 Mod. 11, 178,
213, 229, 311.
Moor 847.
Str. 849, 1247.
Bar. K. B. 229.
2 Sess. Caf. 20.
2 Keble 410.
1 Keble 161.
13 Mod. 504,
615.
1 Roll. 201.
Sayer 167, 301.

(g) C. Eliz. 148.
2 Keble 461.
2 R. Abr. 83.
Latch. 133.

were

were a highway, or only a private way; and therefore shall be intended from the conclusion of the indictment it was a private way.

3 Inst. 205.
Kitchen 11.
2 Burr. 1232.
1 Modern 76.
2 Keble 846.
3 Keble 464.
5 Modern 142.
3 Vent. 169.
10 Mod. 336.
12 Mod. 342.

Sec. 6. There is no doubt but that common bawdy are indictable as common nuisances; also it hath been said common stages for rope-dancers, and also all common houses, are nuisances in the eye of the law, as hath been fully shewn in the foregoing chapter; not only because are great temptations to idleness, but also because they to draw together great numbers of disorderly persons cannot but be very inconvenient to the neighbour

1 Roll 109.
5 Mod. 142.
See Rushworth's
Coll. Part 2.
Vol. 1 fol. 220,
247. Skin. 625
10030.
N. B. For the
offence of acting
plays without
licence Vide
infra ch. 87.

Sec. 7. Also it hath been holden, That a common play may be a nuisance, if it draw together such numbers of or people, &c. as prove generally inconvenient to the adjacent; and it seems to be a proper distinction between houses and the nuisances mentioned in the foregoing That play-houses having been originally instituted with a design of recommending virtue to the imitation of people, and exposing vice and folly, are not nuisances of their own nature, but may only become such by accident, as the others cannot but be nuisances.

(a) 2 R. Abr.
138, 139. 205.
2 Roll 4, 30.
C. Jac. 382,
491.
Morr 238.
1 Roll 36, 201.
Poph. 143.
Con. 5. Co. 101.
(b) F. N. B. 2.
c.
(c) 16 E. 4. 7 b.
Godb. 259.
(d) *Quære Moor*
580, & 621.
C. Eliz. 548.

Sec. 8. It hath been resolved, That neither an old new (a) dovecote, whether it were erected by the lord or manor, or one of his tenants, is a common nuisance; dovecotes were a common nuisance, it could never be lawful by any licence or prescription whatsoever, because a nuisance is a *malum in se*; but it is certain, that a dovecote may be justified by a prescription, and that it is so far from being a nuisance by the law, as to be (b) demandable in a *praeparatio* for any land whatsoever which is not built upon, and the owner may justify the taking another's (c) hawk if he shall find at his dove-house, flying at his pigeons; from hence it seems clearly to follow, That though a man who builds a dove-house without the licence of the lord or manor, may perhaps be liable to an action on the case for the suit of such lord, whose prerogative is said to be infringed upon by the erecting such a house without his licence cannot be punished for it by a publick prosecution.

N. B. For the
nuisance of keep-
ing pigeons, vide
1 Jac. 1. c. 27.
and 2 Geo. 3.
c. 29.

1 Jon. 221.
C. Car. 184.
1 Bulf. 203.
2 R. Abr. 137.
Kit. 11, 23.
St. 18 Ed. 2.

Sec. 9. But perhaps it may be argued, That if a gate being good, it will follow from the same ground, that a gate erected in a highway will be also no nuisance; because, were it could not be justified by any prescription, as it is that it may be; but to this it may be answered, That the erecting of such a gate is therefore a nuisance because it interrupts the free and open passage which they before

nd were lawfully intitled to ; but where such a gate has continued time out of mind, it shall be intended, That it was set at first by consent, on a composition with the owner of the land on the laying out the road, in which case the people had ever any right to a freer passage than what they still enjoy.

Sett. 10. It hath been holden, That it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell ; but the reasonableness of this opinion seems justly to be questionable, because whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in a town ; and surely the trade of a brewer is as necessary as that of a chandler ; and yet it seems to be agreed, That a brew-house, erected in such an inconvenient place, wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance ; and so in the like case may a glass-house or swine-yard.

2 R. Abr. 159.
Cont. 3 Mod.
138.
Cro. Car. 580.
Morley and
Pragnell,
1 Bur. 336.
2 Keb. 500.
Vide 1 Danv.
173, 174.
Salk. 458, 460.
Hutt. 136.
Palmer 536.
Ventris 26.
2 Ld. Ray. 1163

Sett. 11. It seems certain, That it is a common nuisance to divert part of a publick navigable river, whereby the current of it is weakened, and made unable to carry vessels of the same burthen, as it could before. Also it hath been holden to be a common nuisance to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in the time of infection of the plague. (1)

Noy 403.
3 Keble 640,
759.
11 Modern 3.
Fitz. 179.
2 R. Abr. 159.
1 Lut. 169.

(1) Or to make great noises in the night with a speaking trumpet to the disturbance of the neighbourhood, Str. 704. Or permitting a house near the highway to continue in a ruinous condition, Salk. 357. Or laying timber in a public river, although the soil on which it is laid belong to the party, provided it obstructs the necessary intercourse, 3 Bac. Ab. 686. Str. 1247. Or to place a floating dock in the river, although beneficial in repairing ships. Surry affizes at Kingston, 1785. Or to travel with a cart on a common pack or horseway, and by plowing it up to render the use of it inconvenient, 6 Mod. 145. Or to put a ship of 300 tons into Billingsgate Dock, for although it is a common dock, it is only for the reception of small vessels freighted with provisions for the London market. 2 Hawk. c. 25. s. 35. Or to manufacture acid spirit of sulphur, vitriol, or aqua fortis in the vicinity of dwelling houses, 1 Burr. 333. Vide also 13 Ed. 1. c. 24. 12 Rich. 2. c. 13. 1 W. & M. c. 8. s. 8. 30 Geo. 2. c. 22, 31 Geo. 2. c. 17. respecting nuisances in the cities of London and Westminster.

But the fears of mankind, however reasonable, will not create a nuisance, therefore it is no nuisance to erect a building for the purposes of inoculation. 3 Atkyns 21. 726 750. Nor to lay bricks in the river Thames, in the party's own fishery, 3 Burr. 1770. Nor to violate a public law, Black. Rep. 570. Nor to stop up a prospect, 3 Salk. 247. 459. Cro. Eliz. 118. And whether cow or barrows are a nuisance. See 1 Burr. 259. 6 Mod. 453. See also 11 Mod. 7. and 8.

† It is enacted by 9 & 10 Will. 3. c. 7. " That it shall not be lawful for any person to make or cause to be made, or to sell or utter, or offer or expose to sale any fireworks, or any cases, moulds or implements for making the same, on pain of 5*l.* on conviction before one magistrate, on the oath of two witnesses. Or for any person to permit or suffer fireworks to be cast, thrown, or fired from

Of nuisances in making fireworks.

" out

“ out of or in his, her or their house, lodgings or habitations, or from, out of, or in any part or place thereto belonging or adjoining, into any publick street, highway, road, or passage, on pain of 20*s.* on conviction as aforesaid. Or for any person to cast, throw, or fire, or to be aiding or assisting therein, on pain of 20*s.* and that every such offence is and shall be adjudged a common nuisance.”

Of nuisances by erecting lotteries, &c.

† It is also enacted by 10 & 11 Will. 3. c. 17. “ That all mischievous games called lotteries, and all other lotteries, are common and public nuisances; and that all grants, patents and licences for such lotteries or any other lotteries are void and against law; and whoever shall exercise, keep open, shew or expose to be played at, drawn at or thrown at, or shall draw, play or throw at any such lottery or other lotteries either by dice, lots, cards, balls or any other numbers or figures, or any way whatsoever, shall forfeit 500*l.* for every offence, one third to the king, one third to the poor, and the other third, together with double costs, to the party that shall inform and sue for the same, and the parties shall also be prosecuted as common rogues. And whoever shall play throw or draw at any such lotteries shall forfeit 20*l.* in manner aforesaid.”

Of nuisances by bubbling the publick.

† It is also enacted by 6 Geo. 1. c. 18. s. 19. “ That all undertakings, attempts, and projects by publick subscriptions, for adventuring in certain schemes of commerce, tending to the common grievance, of his majesty's subjects or a great number of them, and the receiving and paying of any money upon such subscriptions, &c. and more particularly the presuming to act as a body corporate, or to raise transferrable funds, or pretending to act under any charter formerly granted from the crown for any particular or special purpose therein expressed, by persons making or endeavouring to make use of such charter, for any such other purpose not thereby intended, and all acting or pretending to act under any such obsolete charter, &c. &c. shall be deemed a publick nuisance and nuisances, the offenders made liable to such fines penalties and punishments as are inflicted on a conviction for common and publick nuisances, and moreover to the further pains and penalties of *premunire*.”

2 R. Abr. 44.
C. Car. 184.
1 Jon. 221.
11 Modern 7, 8.
Moor 374.
2 R. Abr. 145.
Salkeld 459.

SECT. 12. As to the second point, viz. How a nuisance may be removed; it seemeth to be certain, That any one may pull down or otherwise destroy a common nuisance, as a new gate, or even a new house erected in a highway, &c. for if one whose estate is, or may be, prejudiced by a private nuisance actually erected, as a house hanging over his ground,

or

or stopping his lights, &c. may justify the entering into another's ground, and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate, surely it cannot but follow *a fortiori*, that any one may lawfully destroy a common nuisance: and as the law is now holden, it seems, that in a plea, justifying the removal of the nuisance, you need not shew that you did as little damage as might be. (a)

Yelverton 122.
 Ld. Raym. 264.
 5 Coke 102.
 9 Coke 54.
 Burrows 2118.
 1 Roll. 95 35.
 B. Nid. 14.
 1 Jon. 221.
 Salkeld 453.
 (a) Quere, vide
 Cooper v. Mar-
 shal, 1 Burrow
 Strange 686.

259, and Rex v. Pappineau.

Sett. 13. It hath been adjudged, that if a river be stopped, to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns, who have a common passage and easement therein, may be compelled to do it.

37 Aff. 10.
 2 R. Abr. 137.

Sett. 14. As to the third point, viz. In what manner common nuisances may be punished. It is said, (b) that a common scold is punishable by being put into the ducking-stool; and there is no doubt, but that whoever is convicted of another nuisance, may be fined and imprisoned. And it is said, That one convicted of a nuisance, done to the king's highway may be commanded by the judgment to remove the nuisance at his own costs; and it seemeth to be reasonable, That those who are convicted of any other common nuisance should also have the like judgment.

(b) 6 Mod. 129
 178, 213.

2 R. Abr. 84.
 2 Self. Cas. 39.

Vide Strange
 686. Rex. v.
 Pappineau, and
 the cases there
 cited.

CHAPTER THE SEVENTY-SIXTH.

OF NUSANCES RELATING TO HIGHWAYS.

AND now I am particularly to consider such nuisances as relate to highways, and publick houses. And for the better understanding of those which concern highways I shall consider: Such as relate to highways in general. And Such as relate to bridges in particular.

For the better understanding of nuisances relating to highways in general, I shall examine the following particulars:

1. What shall be said to be a highway.
2. At whose charge and by whom it ought to be repaired.
3. In what manner it is to be enlarged.
4. How the surveyors thereof shall be appointed.

5. How

5. How such surveyors ought to execute their office.
6. What shall be said to be a nuisance to the highway.
7. How such nuisances are to be removed and punished.
8. In what manner those who are charged with any offence relating to the highway, are to be proceeded against.
9. How persons so proceeded against may defend themselves.

As to the first point, viz. What shall be said to be a highway, it is said that there are three kinds of ways: *First*, a footway, which is called in Latin, *iter*. *Secondly*, a pack and prime-way, which is both a horse and foot-way, and called in Latin, *actus*. *Thirdly*, a cart-way, which contains the other two; and also a cart-way, and is called in Latin, *via* or *aditus*, and this is either common to all men, and then it is called, *via regia*, or belongs to some city or town, or private person, and then it is called, *communis strata*.

Co. Lit. 56.

Communis strata
and *alta via regia*
are synonymous
terms. Str. 44.
20 Modern 383.
Andrews 143.

Palm. 389.

6 Modern 255.

B. R. H. 315.

(a) C. Ellis. 63.

(b) 1 Vent. 208.

2 Keble 178.

3 Keble 26.

6 Modern 255.

(c) 27 Aff. 23.

Fitch. 279.

2 Com. Dig.

307.

(d) Co. Lit. 56.

5 Ed. 4. 2.

(e) 3 & 4 W. &

M. 12.

4 Burr. 209 t.

(f) Kitchen 35.

Palmer 389.

2 Roll. 412.

(g) Moore 180.

Cio. E. 664.

Co. Lit. 56.

27 H. 8. 27.

(h) 1 Vent. 189.

Kitchen 35.

1 Vent. 203.

3 Keble 28.

Ld. Raym. 1174

Salkeld 359.

Secd. 1. It seemeth that any one of the said ways, which is common to all the king's people, whether it lead directly to a market-town, or only from town to town, may properly be called a highway, and that any such cart way may be called the king's highway, and that a nuisance in any of the said ways is punishable by indictment in the court-leet; for indictments for (a) stopping horseways, and (b) footways, have often been allowed, and where others have been quashed, no other reason has been given for it, but that the way was not called a common way or highway; and in (c) books of the best authority, a river common to all men is called a highway; and it is laid (d) down as a general rule, That nuisances to any way common to all men, are inquirable in the leet, and horse-causeys are taken notice of by (e) parliament; and therefore there seems to be no reason why any way leading from village to village, which does not terminate there, but is also a thoroughfare to other towns, may not properly be called a common or highway, or why a nuisance therein should not be indictable, whether it directly leads to a market-town or not; for since such a way lies open to all the king's subjects, a nuisance therein (f) cannot but be a common nuisance, and if it be not punishable by indictment it would not be punishable at all, inasmuch as it (g) seems to be certain, That it is not punishable by action, because if one man might bring his action in respect of the possibility of the damage which he might receive from it, all other men may do the like, which would introduce a multiplicity of actions; and therefore the distinction which is taken in some (h) books concerning this matter, seems to be very reasonable, That every way from town to town may be called a highway, because it is common to all the king's subjects,

subjects, but that a way to a parish-church, or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the king's subjects, but only to some particular persons, each of which, as it seems, may have an action on the case for a nuisance therein. (1)

(1) A street built upon a person's own ground, is a dedication of the highway so far only as the publick has occasion for it, viz. for a right of passage, and is not to be understood as a transfer of the absolute possession of the soil. Strange 1004.

Sett. 2. It hath been holden, that if there be a highway in an open field, and the people have used, time out of mind, when the ways are bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not only the beaten track; from whence it follows, That if such outlets be sown with corn, and the beaten track be foundrous, the king's subjects may justify going upon the corn. (2)

(2) So if one grants me a way, and afterwards digs trenches in it to my hindrance, I may fill them up again. But if a way which a man has, becomes not passable, or becomes very bad, by the owner of the land tearing it up with his carts, so that the same be filled with water; yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. Godb. 52, 53. But in such case he may bring his action against the owner of the land for spoiling the way, or perhaps he may go out of the way, upon the land of the wrong doer, as near to the bad way as he can. But where a private way is spoiled by those who have a right to pass thereon, and not through the default of the owner of the land; it seems that they who have the use and benefit of the way ought to repair it, and not the owner of the soil, unless he is bound thereto by custom or special agreement. 2 Burr. 382. So if I have a private way without a gate, and a gate is hung up, an action lies upon the case, for I have not my way as I had before. Litt. R. 267.

Sett. 3. It seemeth to be agreed, That an ancient highway cannot be changed without the king's licence first obtained upon a writ of *ad quod damnum*, and an inquisition thereon found, That such a change will not be prejudicial to the publick; and it is said, that if one change a highway without such authority, he may stop the new way whenever he pleases; and it seemeth, That the king's subjects have not such an interest in such new way as will make good a general justification of their going in it as in a common highway; but that in an action of trespass brought by the owner of the land against those who shall go over it, they ought to shew especially, by way of excuse, how the old way was obstructed, and the new one set out; also it is said, That the inhabitants are not bound to keep watch in such new way, or to make amends for a robbery therein committed, or to repair it.

C. Car. 266,
267.
Vaugh 342.
1 Burr. 465.
Vide Note (3)
infra.

C. Car. 267.
Yelv. 141, 142.

C. Car. 267.
22 Ailize 93.
3 R. Abr. 390.
Vide Taylor v.
Whitbread,
Douglas 745.

Sec. 4. However it is certain, That a highway may be changed by the act of God; and therefore it hath been holden, That if a water which has been an ancient highway, by degrees changes its course, and goes over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old. (3)

(3) An owner of land over which there is an open road may inclose it by his own authority, but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. But if he alter or change the road by the legal course of a writ of *ad quod damnum*, he is not obliged to repair the new road, unless the jury impose such a condition upon him; for otherwise it stands just as it did before. Even though it was at first open and should be directed by the jury to be inclosed.—And a private act of parliament for inclosing lands, which vests a power in commissioners to set out new roads by their award is equally strong as to these consequences as a writ of *ad quod damnum*. 1 Burr. 465.

As to the second point, viz. At whose charge, and by whom the highway ought to be repaired, I shall consider, What provision is made by the common law concerning this matter; and, What by statute.

(a) 1 R. Abr.
890.
(b) March 26.
1 Vent. 90, 183.
189.
Sum. 145.
3 H. 7. 5.
14. Raym. 725.

Sec. 5. As to the first of these particulars, it seems to be agreed, That of common right, the general charge of repairing all highways lies on the occupiers of the lands in the parish wherein they are; but it is said, That the tenants of the lands adjoining are bound to scowr their ditches, and there is no doubt but particular persons may be burthened with the general charge of repairing the highway in two cases: viz. In respect of an inclosure of the land wherein it lies. And In respect of a prescription.

1 R. Abr. 390.
C. Car. 366.
1 Siderfin 464.
Sed Vide 1 Burr.
461 to 466,
contra.
14. Raym. 1170

Sec. 6. And first a particular person may be bound to repair a highway in respect of an inclosure; as where the owner of lands not inclosed, next adjoining to the highway, incloses his lands on both sides thereof, in which case he is bound to make a perfect good way, and shall not be excused for making it as good as it was at the time of the inclosure, if it were then any way defective, because, before the inclosure, the people used, when the way was bad, to go for their better passage, over the fields adjoining, out of the common track, which liberty is taken away by the inclosure.

1 Siderfin 464.

Sec. 7. Also it hath been holden, That if one inclose land on one side, which hath been anciently inclosed of the other side, he ought to repair all the way, but that if there be not such an ancient inclosure of the other side, he ought to repair but half that way: and it is said, That where ever one is bound to repair a highway in respect of an inclosure, and
lays

lays it open again as it was before, he shall be freed from the charge of repairing it. (4)

(4) So in a writ of *ad quod damnum*, and inquisition found thereupon, after the person hath once made the road, (and N. B. it is not necessary the whole new road should go through his own soil,) the parishioners ought to keep it in repair; because being discharged from the repairing of the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the person who sued out the writ, and his heirs ought to keep it in repair; because the inhabitants of the other parish gaining no benefit from the old road being taken away, it would be imposing a new charge upon them, for which they enjoyed no compensation. 3 Atk. 772.

SECT. 8. Secondly, A particular person may be bound to repair a highway in respect of a prescription; (a) and it is said, That a corporation aggregate may be compelled to do it by force of a general prescription, That it ought and hath used to do it, without shewing that it used to do so in respect of the tenure of certain lands, or for any other consideration, because such a corporation in judgment of law never dies, and therefore, if it were ever bound to such a duty, it must needs continue to be always so; neither is it any plea, That such corporation have always done it out of charity; for what it hath always done, it shall be presumed to have been always bound to do; but it is said, That a person cannot be charged with such a duty by a general prescription from what his ancestors have done, because no one is bound to do what his ancestors have done, unless it be for some special reason, as the having land descended from such ancestors, which are holden by such like service, &c. yet it seems, That an indictment charging a tenant in fee-simple with having used of right to repair such a way *ratione tenuræ terræ suæ*, is certain enough, without adding, That his ancestors, or those whose estate he hath, have always so done, for that is implied in saying, That he has always used to do it *ratione tenuræ suæ*. Also an occupier, as such, though at will only, is indictable for suffering a house standing upon the highway to be ruinous, &c. and the words *ratione tenuræ*, &c. if added, are surplus.

SECT. 9. However it seemeth certain, That whether a particular person be bound to repair a highway by inclosure, or prescription, &c. yet the parish cannot take advantage of it upon the plea of Not guilty to an indictment against them for not repairing it, but ought to set forth their discharge in a special plea. (5)

(5) The repair of highways lies, of common right, upon the whole parish. But if a parish lies in two distinct counties, an indictment may be brought against that part of the parish in which the ruinous road lies. 4 Burr. 2511. But it must appear upon the face of the indictment by what right the charge is laid upon the particular division of any parish which is in one county only. 5 Burr. 2702. As that they have repaired time out of mind. Andr. 276. B. R. H. 259.

(a) Where the original of a way is accounted for, the prescription is destroyed. Strange 909. 2 Saund. 160. 27 Affize 8. 21 Ed. 4. 38. Brook Prescription 49, 78. Far. 54, 55. 21 Ed. 4. 31. A person indicted for not repairing roads *ratione tenuræ* shall pay costs to the prosecutor. 1 Black. 601. See Vich. Back. K. v. Cheshunt contra. Kellw. 52. a. Latch. 206. 3 Salk. 77, 381. 6 Modern 150, 100, 255. Salk. 357. a.

1 Mod. 112. 3 Keble 301. 1 Ventris 256. 10 Mod. 150, 382. 12 Modern 15. 198, 409. Ld. Ray. 725, 922, 1162. Strange 179.

SECT. 10. AND now I am to consider in the second place, at whose charge, and by whom the highway ought to be repaired by force of THE STATUTE.

For the better understanding whereof, I shall examine: First, Who are by statute compellable to work in the repairs thereof in their own persons, or by others. Secondly, Who may be assessed to a rate made for the defraying of the extraordinary charges of such repairs. Thirdly, What other provisions have been made to this purpose. Fourthly, In what manner the profits of lands settled in trust for the repairs of the highways shall be employed.

Statute duty.
N. B. By 13
Geo. 3. c. 84,
s. 60. the same
powers are given
to the surveyor
of turnpike
roads, with the
consent of the
trustees.

(6) The inhabi-
tants of a parish
into which a
road is turned
by turnpike
trustees, are not
bound to do
statute work
thereon.
Black. 603.

(7) The appoint-
ment of the six
days work must
specify the par-
ticular days.
Ld Raym. 858.

+ As to the first point, It is enacted by 13 Geo. 3. c. 78. par. 34. " That the surveyor to be appointed, as hereafter men-
" tioned, together with the inhabitants (6) and occupiers of
" lands, tenements, woods, tithes, and hereditaments, within
" each parish, township, or place, shall at proper seasons in
" every year, use their endeavours for the repair of the high-
" ways, and shall be chargeable thereunto, as followeth :
" Every person keeping a waggon, cart, wain, plough, or
" tumbrel, and three or more horses or beasts of draught
" used to draw the same, shall be deemed to keep a team,
" draught, or plough, and be liable to perform statute-
" duty with the same, in the parish, township, or place,
" where he resides, and shall, six days (7) in every year, (if so
" many days shall be found necessary) to be computed from
" Michaelmas to Michaelmas, send on every day, and at
" every place, to be appointed by the surveyor for the
" amending the highways in such parish, township, or place,
" one wain, cart, or carriage, furnished after the custom
" of the country, with oxen, horses, or other cattle, and
" all other necessities fit to carry things for that purpose,
" and also two able men with such wain, cart, or carriage ;
" which duty so performed, shall excuse every such person
" from his duty in such parish, township, or place, in re-
" spect of all lands, tenements, woods, tithes, or heredita-
" ments, not exceeding the annual value of fifty pounds, which
" he shall occupy therein. And every person keeping such
" team, draught, or plough, and occupying in the same
" parish, township, or place, lands, tenements, woods, tithes,
" or hereditaments of the yearly value of fifty pounds,
" over and beyond the said yearly value of fifty pounds, in
" respect whereof such team-duty shall be performed ; and
" every such person occupying to the yearly value of fifty
" pounds in any other parish, township, or place, besides
" that wherein he resides, and every other person not keep-
" ing a team, draught, or plough, but occupying to the
" yearly value of fifty pounds, in any parish, township, or
" place, shall, in like manner respectively, and for the
" same number of days, find and send one wain, cart, or car-
" riage, furnished with not less than three horses, or four
" oxen and one horse, or two oxen and two horses, and two
" able

" able men to each wain, cart, or carriage; and in like
 " manner for every fifty pounds *per annum* respectively, which
 " every such person shall further occupy, in any such parish,
 " township, or place respectively; such wains, carts, or car-
 " riages, to be employed by the surveyor in the repairing and
 " amending the highways within the parish, township, or
 " place, where such lands, tenements, woods, tithes or
 " hereditaments, shall respectively lie; and every person
 " who shall not keep a team, draught, or plough, but shall
 " occupy under the yearly value of fifty pounds, in the
 " parish, township, or place where he resides, or in any
 " parish, township, or place; and every person keeping a
 " team, draught, or plough, and occupying under the yearly
 " value of fifty pounds, in any other parish, township, or
 " place, than that wherein he resides, shall respectively con-
 " tribute to the repair of the highways, and pay to the sur-
 " veyor of such parish, township, or place respectively, in lieu
 " of such duty, the sums following; *viz.* For every twenty
 " shillings of the annual value of such lands, tenements,
 " woods, tithes, or hereditaments respectively, the sum of
 " one penny for every day's statute-duty which shall be re-
 " quired and called for by the surveyor of such parish,
 " township, or place respectively, in every year not exceeding
 " six days duty in the whole, as aforesaid; and every such
 " person respectively shall, in like manner, pay the sum of
 " one penny for every twenty shillings of the annual value
 " which he shall occupy in any such parish, township, or
 " place respectively, above the annual value of fifty pounds,
 " and less than one hundred pounds, and so for every
 " twenty shillings that each progressive and intermediate
 " annual value of twenty shillings, which he shall so oc-
 " cupy, shall fall short of the further increase of fifty
 " pounds, in every parish, township, or place, where such
 " lands, tenements, woods, tithes, and hereditaments, shall
 " respectively lie, for every day's statute-duty so to be
 " required as aforesaid; which said several sums shall be
 " considered as compositions, and shall be paid to the sur-
 " veyor of the parish, township, or place, in which they
 " are charged, for the use of the highways therein, at the
 " time such compositions are to be paid under the authority
 " of this act, or within ten days after; or in default of
 " such payments, such money shall be levied by distress,
 " and sale of the goods and chattels of the person or per-
 " sons refusing to pay the same, in such manner as the for-
 " feitures for the neglect in performing the statute-duty are
 " hereby authorised to be levied and raised: Provided, that
 " no person keeping such team, draught, or plough, and per-
 " forming the duty with the same, as aforesaid, in the parish,
 " township, or place, where he resides, and not occupying
 " within the same, to the yearly value of thirty pounds, shall
 " be obliged to send more than one labourer, with such
 " team, draught, or plough."

Contribution
money.

How the contri-
butions are to
be received.

The duty required from persons who do not keep a team, but keep one or two horses used to draw, or who keep a coach, post-chaise, &c.

Labour from occupiers of less than 4*l.* per annum.

Three men to be sent, or 4*s.* 6*d.* to be paid.

† *Secl.* 11. And it is further enacted by the said statute, par.
 35. “ That every person who shall not keep a team, draught
 “ or plough, but shall keep one or more cart, or carts, and,
 “ one or two horses or beasts of draught only, used to draw in
 “ each of such carts upon the highways, shall be obliged to
 “ perform his statute-duty for the like number of days with
 “ such cart or carts, and horse or horses, or beasts of draught,
 “ and one labourer to attend each cart, or to pay for the lands,
 “ tenements, woods, and hereditaments, which he shall oc-
 “ cupy, according to the rate aforesaid, at the option of the
 “ surveyor ; and every person who shall keep a coach, post-
 “ chaise, chair, or other wheel-carriage, and not keep a team,
 “ draught, or plough, nor occupy lands, tenements, woods,
 “ tithes, or hereditaments, of the annual value of fifty pounds,
 “ in the parish, township, or place where he shall reside, shall
 “ pay to the surveyor one shilling in respect of every such
 “ day’s statute-duty, for every horse which he shall draw
 “ in any such carriage, or shall pay according to the value
 “ which he shall occupy, according to the rate aforesaid, at
 “ the option of the surveyor ; and also every man inhabiting
 “ in any parish, township, or place, and being of the age of
 “ eighteen, and under the age of sixty years, not chargeable
 “ in any of the respects aforesaid for lands, tenements, woods,
 “ tithes, or hereditaments, of the yearly value of four pounds,
 “ or upwards, and not being *bona fide* an apprentice or menial
 “ servant, nor having performed the said duty, or paid the
 “ composition for the same, in any other parish, township, or
 “ place, for that year, shall, by themselves, or one sufficient
 “ labourer for every of them, upon every of the said days on
 “ which they shall be called forth by the said surveyor, to-
 “ gether with the said other labourers, work and labour in
 “ the amendment of the said highways, as they shall be di-
 “ rected by such surveyor ; and if the said teams, draughts,
 “ or ploughs, or any of them, shall not be thought needful
 “ by the surveyor on any of the said days, then every such
 “ person who should have sent any such team, draught, or
 “ plough, according to the directions aforesaid, shall, accord-
 “ ing to the notice to be given, as herein after directed, send
 “ unto the said work, for every one so spared, three able men,
 “ there to labour as aforesaid, or to pay to the said surveyor
 “ four shillings and sixpence in lieu thereof ; and all such per-
 “ sons as aforesaid shall respectively have and bring with them
 “ such shovels, spades, picks, mattocks, and other tools and
 “ instruments as are useful and proper for the purposes afore-
 “ said ; and all the said persons and carriages shall diligently
 “ perform the work and labour to which they shall be ap-
 “ pointed by such surveyor for eight hours in every of the said
 “ days, within such parish, township, or place, or in getting
 “ and carrying materials in and from any other parish, town-
 “ ship, or place, to be employed in the repair of the highways
 “ of the parish, township, or place, for which they shall be
 “ required

“ required to perform such duty and labour as aforesaid: And The hours of working, &c.
 “ if any person sending a team, as aforesaid, shall not send a
 “ sufficient labourer besides the driver, (except as herein before
 “ mentioned); or if any such labourer, or driver, or any other
 “ labourer, or the driver of any cart, required by this act to
 “ perform statute-duty as aforesaid, shall refuse to work and
 “ labour, during the time above-mentioned, according to the
 “ direction of the surveyor; or if any driver shall refuse to
 “ carry proper and sufficient loads; it shall and may be law-
 “ ful for such surveyor to discharge every such team, cart, or
 “ labourer, and to recover from the owner of every such
 “ team or cart the forfeiture which every such person or per-
 “ sons would have incurred by virtue of this act, in case no
 “ such team, cart, or labourer respectively, had been sent.”

† *Sett.* 12. It is also further enacted by the above-mentioned Part of a team may be called for.
 statute, par. 36. “ That the surveyor, where the employment
 “ for teams is of such sort that two horses will be sufficient,
 “ for one cart, or where a stand cart with one horse shall be
 “ necessary, shall call upon any person liable to send a team,
 “ draught, or plough, by virtue of this act, who keeps one
 “ or more cart or carts, and three or more horses, to send
 “ such cart or carts, horse or horses, to perform his statute-
 “ duty, as the surveyor shall find most convenient, and shall
 “ direct; and the surveyor shall allow every such stand cart
 “ and one horse as half a team, and every cart and two hor-
 “ ses as two-thirds of a team; and if a waggon shall be found
 “ necessary for any particular business, the surveyor may re-
 “ quire the duty, or any part thereof, to be performed with
 “ such waggon, by any person who keeps one; which direc-
 “ tions of the surveyor shall be observed, or the person liable
 “ to perform such duty shall forfeit such sum as the duty so
 “ required of him shall bear, in proportion to the forfeiture
 “ hereby inflicted for every neglect in performing duty with
 “ a team, draught, or plough.”

† And further by par. 37. “ Every such surveyor shall, Notice and forfeiture.
 “ from time to time, give to, or cause to be left at the
 “ house or usual place of abode of every person or persons
 “ so liable to perform such duty or labour, as in this act di-
 “ rected, four days notice at the least of the day, hour, and
 “ place, upon which each of the said day's duty shall be
 “ required to be performed; and every person or persons
 “ making default in finding and sending each wain, cart, or
 “ carriage, furnished as aforesaid, and such able men with
 “ the same, as herein required, or in performing the said duty
 “ at the time and place, and in the manner, by this act di-
 “ rected, shall, for every such default or neglect in sending
 “ such wain, cart, or carriage, with such men as aforesaid,
 “ forfeit the sum of ten shillings; and for every default in
 “ sending every cart with one horse and one man, three
 “ shillings;

The surveyor to
be impartial.

“ shillings; and for not sending every cart with two horses
“ and one man, five shillings: and every person or persons
“ making default in sending any such labourer, and every per-
“ son making default in performing such labour, at the time and
“ place, and in the manner directed by this act, or in paying
“ such composition-money for the same, as herein mentioned,
“ shall, for every such neglect, forfeit the sum of one shilling
“ and sixpence; all which forfeitures shall be applied for the
“ use of the highways within the parish, township, or place,
“ where the same shall arise; and the said surveyor shall fairly
“ and equally demand and require such duty and labour from
“ every person or persons liable to perform the same, according
“ to the directions of this act, without favour or partiality to
“ any person or persons whomsoever: and if in any parish,
“ township, or place, it shall not be necessary to call forth the
“ whole duty in any year, it shall be abated in a just and
“ equal proportion amongst all persons liable to the same;
“ and the said surveyor may and shall, and he is hereby re-
“ quired, with all convenient speed, after default made in per-
“ formance of such duty or labour as aforesaid, to proceed for
“ the recovery of the penalties or forfeitures hereby inflicted
“ for the same respectively, in manner herein-after directed,
“ so that the same may be recovered before he makes up his
“ accounts in the manner directed by this act.”

Application of
the forfeitures.

Compounding.

† *Stat. 13.* But it is also further enacted by par. 38. “ That
“ any person or persons liable to perform the said duty, by
“ sending one or more team or teams, draught or draughts,
“ plough or ploughs, with men, horses, or oxen, in manner
“ aforesaid, shall and may compound for the same, if he, she, or
“ they, shall think fit, by paying to the said surveyor, at the
“ time, and in the manner, herein after mentioned, such sum
“ or sums of money as the justices of the peace for the limit
“ wherein such parish, township, or place, shall be, or the
“ major part of them, at their said special sessions, to be held
“ in the first week after *Michaelmas* quarter sessions in every
“ year, shall adjudge and declare to be reasonable, not ex-
“ ceeding six shillings, nor less than three shillings, for each
“ team, draught, or plough, for each day; and in default of
“ their adjudging and declaring the same, the sum of four
“ shillings and six pence for and in lieu of ever such day’s
“ duty for each team, draught, or plough; and for every cart
“ and one horse or beast of draught, two shillings; and for
“ every cart with two horses or beasts of draught, three shil-
“ ling; for and in lieu of every day’s duty; and every inhabi-
“ tant liable to perform such duty or labour, as aforesaid, and
“ not chargeable in any other respect, as aforesaid, shall and may
“ compound for the same, if he, she, or they, shall think fit,
“ by paying to the surveyor the sum of four-pence for and in
“ lieu of every such day’s duty or labour respectively, at the
“ time.”

“ time, and in the manner, herein-after directed for the pay-
“ ment of composition-money.

† Provided by par. 39. “ That if it shall appear to the jus-
“ tices, at their special sessions, to be held in the week next
“ after *Michaelmas* quarter sessions, that, from the directions
“ herein before given for the performing and compounding
“ the statute-duty, there will be difficulty in procuring the
“ necessary carriages, or a sufficient number of labourers, for
“ the repair of the highways, in any particular parish, town-
“ ship, or place, within their respective limits, without pay-
“ ing high and extravagant prices for the same, it shall and
“ may be lawful for such justices to order and direct the team-
“ duty hereby required, or so much thereof as they shall think
“ fit, to be performed in kind, within every such parish,
“ township, or place, except in respect of such teams as be-
“ long to persons who do not occupy lands, tenements,
“ woods, tithes, or hereditaments, of the annual value of
“ thirty pounds within the same; and also to order the la-
“ bourers, liable by this act to perform or compound for sta-
“ tute-duty, or such part of them as they shall think fit, to
“ perform six days labour upon such highways in kind, in case
“ so many days duty shall be required, upon being paid for
“ such labour the usual and customary wages given to la-
“ bourers in such parish, township, or place, deducting there-
“ out the sum of four-pence for each day's duty so perform-
“ ed, being the composition hereby allowed for labourers;
“ provided; that if part of such teams or labourers only are
“ required, it shall be directed by the said order of the justices
“ in some given proportion, as one half, third, or fourth part
“ thereof; and the surveyor shall, in that case, at a publick
“ vestry for such parish, township, or place, put the names
“ of all the persons liable by this act to send such teams into
“ one hat or box, and the names of all the persons liable to
“ perform such labour, into another hat or box, and some in-
“ habitant then present shall draw out such number from each
“ as shall be equal to the proportion so ordered by the said
“ justices, and the persons so drawn shall perform such duty
“ in kind for that year; and that if any such order shall be
“ made or continued in the subsequent year, the same method
“ shall be observed, but the names drawn in the preceding
“ year shall not be put into such hat or box; and in every suc-
“ ceeding year such method and regulation shall be observed
“ by such surveyor, as to render the duty so required to be
“ performed in kind as equal amongst the several persons liable
“ thereto as may be: which order of the said justices, so far
“ as the same shall be extended, shall supersede the said power
“ or liberty of compounding, and shall be binding and effec-
“ tual to all intents and purposes whatsoever, and shall con-
“ tinue in force until it shall be discharged or varied by the

Power of justices
to direct duty in
any part of the
parish, &c.

“ justices at some subsequent special sessions for the highways
 “ within such limit, to be held in the week next after *Mi-*
chaelmas quarter sessions.

Power of
mitigation.

† It is also further enacted by par. 40. “ That where any
 “ person shall keep a team, draught, or plough, and shall
 “ not occupy lands, tenements, woods, tithes, or heredita-
 “ ments, to the value of thirty pounds *per annum*, in the pa-
 “ rish, township, or place, where he shall reside, but shall in
 “ part maintain his horses and beasts of draught used in such
 “ team upon or from lands which he shall occupy in one or
 “ more adjacent parish or parishes, it shall and may be law-
 “ ful for the said justices, at some special sessions, to mitigate
 “ and reduce the duty or composition so required to be per-
 “ formed or paid by such person or persons, in such manner,
 “ and to such sum, as they shall think just and reasonable.

Surveyors to
give notice of
the time and
place for com-
pounding.

† Provided, par. 41. “ That the said surveyor of every parish
 “ township, or place, shall, on some *Sunday* in *November* in every
 “ year, cause ten days notice at the least to be given in the
 “ church or chapel of such parish, township, or place, and if
 “ there be no church or chapel; or no service performed
 “ therein, then at the most publick place there, and repeat
 “ the like notice in such church, chapel, or place, on the
 “ next succeeding *Sunday*, of the time and place when and
 “ where the persons permitted under the authority of this act,
 “ and inclined to compound for the said duty, in manner
 “ aforesaid, may signify to such surveyor their intention to
 “ compound; and all persons signifying the same, who shall
 “ then, or within the space of one calendar month after-
 “ wards, pay to such surveyor the composition authorised and
 “ allowed by this act, shall be discharged from the perform-
 “ ance of such duty, which composition-money shall be em-
 “ ployed by the surveyor for the use of the highways; and
 “ that no composition shall be permitted, unless the same shall
 “ be paid at the day, or within the time aforesaid; but in
 “ cases where the occupation of any lands, tenements,
 “ woods, tithes, or hereditaments, shall be changed, or any
 “ new occupant or inhabitant shall come to reside in such
 “ parish, township, or place, after the time appointed for
 “ such composition, then the person or persons occupying such
 “ lands, tenements, woods, tithes, or hereditaments, or so
 “ residing in such parish, township, or place, shall be allowed
 “ to compound in manner aforesaid: provided, he, she or they,
 “ shall pay the said composition-money to the said surveyor
 “ within fourteen days after he, she, or they, shall enter upon
 “ such lands, tenements, or hereditaments, or shall come to
 “ reside in such parish, township, or place; and every tenant
 “ or occupier of any lands, tenements, woods, tithes, or he-
 “ reditaments, who intends to quit the possession thereof,

“ within

“ within six calendar months from the time fixed for making
 “ such composition, shall and may compound for half the duty
 “ hereby required, and the succeeding tenant or occupier shall
 “ and may, in that case, compound or perform the duty in
 “ kind for the other half thereof; and if the surveyor shall
 “ receive from any person or persons a composition for more
 “ duty than shall be required from the other inhabitants and
 “ occupiers within the same parish, township, or place, for
 “ the same year, he shall repay such extraordinary compo-
 “ sition-money to such person or persons, so as to bring the
 “ duty to an equality amongst all such inhabitants and oc-
 “ cupiers.

How the com-
positions shall
be paid, &c.

“ † *Sec. 14.* And it is further enacted by par. 42. where
 “ any person shall keep a draught or plough, and no carriage,
 “ he shall pay to the surveyor the sum of one shilling for every
 “ horse or pair of oxen or neat cattle, used in such draught or
 “ plough, for every day's statute-duty on the day such duty is
 “ required to be performed, or pay according to the rate
 “ aforesaid for the lands, tenements, woods, tithes, and he-
 “ reditaments, which he shall occupy in such parish, town-
 “ ship, or place, at the option of the surveyor. And by par.
 “ 43. the inhabitants of every parish, township, or place,
 “ at some vestry, or other publick meeting, held pursuant to
 “ this act, may appoint three months in every year, within
 “ which no statute-duty shall be performed. One month in
 “ the spring, to be called the *seed month*; one month in the
 “ summer, for the hay harvest; and one other month in the
 “ summer, for the corn harvest: provided, that notice in
 “ writing, be given of the times so appointed to the surveyor
 “ of such parish, township, or place respectively, and also to
 “ the surveyor of every turnpike road lying within the same,
 “ within three days after every such meeting and fourteen days
 “ at least before the beginning of each of such months.

Duty where no
carriage is kept.

Of the seed
month.

† N. B. In the exposition of the former statutes upon this
 subject, *viz.* The 2 and 3 Philip and Mary, c. 8. s. 2. The
 22 Car. 2. c. 12. s. 8. and 9. The 18 Eliz. c. 10. sect. 2. and
 3. and The 7 and 8 Will. 3. c. 29. the language of which
 is, with little variation, pursued by the above statute, 13
 Geo. 3. c. 78. the following opinions have been holden.

Enumeration of
the statutes upon
this subject reci-
ted in the for-
mer edition.

Sec. 15. First, That (a) persons in holy orders are (a) 3 Keb. 255,
 within the purview of them, in respect of their spiritual pro- 476.
 fessions, as much as any other persons whatsoever, in respect 1 Ventris 273.
 of any other possessions, for the words are general, and there Watson 40.
 is no kind of intimation that any particular persons shall be 2 Inst. 704.
 exempted more than others. (8) (8) But by 30
 Geo. 2. c. 25.
 s. 23. persons
 serving forthem-

selves as privates in the militia are exempted from statute work during the time of such service.

Sec.

(a) Raym. 186.

3 Keble 567,
468, 568.

Vide Dalt. c. 26.

3 Keble 617.

Secd. 16. Secondly, (a) That he who keeps several draughts in a parish is bound to send a team for each draught, whether he occupy any land in the parish or not; and in like manner, That he who occupies several plough-lands, ought to send a team for each plough-land, whether he keeps any draught, or not.

(b) Palm. 389.

3 Roll 412.

Secd. 17. Thirdly, That (b) notwithstanding the words of the statute extend only to the occupiers of lands, yet if the owner neither occupy them, nor let them, but suffer them to lie fresh, he shall be charged as much as if he had occupied them, for there is no reason that the publick shall suffer for his negligence.

Dalt. c. 26.

Secd. 18. Fourthly, That it is no excuse for the inhabitants of a parish, being indicted at common law for not repairing the highways, That they have done the full work required of them by statute; for since these statutes are wholly in the affirmative, and made in aid of the common law, and to supply the defects thereof, they shall not be construed to abrogate any provision thereby made for these purposes.

Chapter 26.

N. B. DALTON is of opinion, that he who keeps a draught and but two horses, ought to attend therewith at the times appointed, and that if he carry with them such loads as they are able to draw, he shall be excused.

How the funds
of turnpike
roads may be
applied to the
statute repair of
the highways.

† *Secd. 19.* And whereas there may be turnpike roads in such a state and condition of repair, that the statute duty required to be performed upon them may be dispensed with, &c. &c. It is therefore enacted by 13 Geo. 3. c. 84. sect. 58. " That the justices at any special sessions, upon application to
" them made by the surveyor of any place, in which such
" turnpike road lies, may summon the clerk and surveyor of
" such turnpike road to appear before them, at some other
" special sessions, and then and there to produce before them
" a state of the revenues and debts belonging to such turn-
" pike road, and such justices may then and there enquire into
" the state and condition of the repairs thereof, and also of
" such other highways, and if it shall appear to them, upon
" full and clear evidence, that the whole or any part of such
" statute duty may be conveniently dispensed with from such
" turnpike roads, without endangering the securities for the
" money advanced upon the credit of the tolls thereof, and
" that such statute duty is wanted for the repairs of the other
" highways within such parish, township, or place, the said
" justices may order the whole or part of such statute duty to
" be performed upon the highways, not being turnpike, with-
" in such parish, township, or place, under the direction of
" the surveyor thereof, during such time as to them shall seem
" just and reasonable."

† *Stat.* 20. As to the second point, *viz.* Who may be assessed to a rate made for the defraying of the extraordinary charges of such repairs, it is recited by the above mentioned statute of 13 Geo. 3. c. 78. par. 30. "That in some parishes, townships, or places, there may not be sufficient materials for the repair of the highways within the same, nor within the waste lands, common grounds, rivers or brooks, of any other parish, township, or place, lying within a convenient distance from such highway, by reason whereof the surveyor of such highway may be forced to buy such materials, and to make recompence and satisfaction to the owner or occupier of inclosed lands, for damage which may be done by getting and carrying thereof: and whereas no provision is made for raising a fund to reimburse the expences thereof, and also such expences as the said surveyors may incur, by erecting guide-posts, or other posts or stones, and by making or repairing such trunks, tunnels, plats, bridges, or arches, as aforesaid, and by rendering satisfaction for damages done to lands by the making of new ditches or drains, nor for the salary to be paid by such parish, township, or place, to such surveyor, as aforesaid;" it is therefore enacted, "That upon application by such surveyor to the justices of the peace, at their special sessions, and oath made of the sum or sums of money which he hath *bona fide* laid out and expended, or which will be required for the purposes aforesaid, the said justices, or any two or more of them, shall, and they are hereby empowered, by warrant under their hands and seals, to cause an equal assessment to be made, for the purposes aforesaid, upon all occupiers of lands, tenements, woods, tithes, and hereditaments, within such parish, township, or place, where such money shall be so expended or laid out; and the same shall be made and collected by such person or persons, and allowed in such manner, as the said justices, by their order at such sessions, shall direct and appoint in that behalf; and the money thereby raised shall be employed and accounted for according to the direction of the said justices, for the purposes aforesaid; and the said assessment shall be levied in such manner as herein-after mentioned: provided nevertheless, That no such assessment to be made for those or any of those purposes, in any one year, shall exceed the rate of sixpence in the pound, of the yearly value of the lands, tenements, woods, tithes, and hereditaments, so to be assessed."

The 22 Car. 2.
f. 10, 11.
The 3 and 4
Will. and Mar.
c. 12.
The 7 and 8
Will. 3. c. 29.
f. 4. which were
here recited in
the former edi-
tion of this work
are repealed by
7 Geo. 3. c. 42.

(9) An order for
imposing a rate
was quashed,
because it did
not appear but
that the statute
duty was
sufficient, and
because only the
occupiers of
land were
charged, where-
as others are
equally liable.
Str. 315. Sed
Vide Fort. 327.

† *Stat.* 21. And it is further enacted by the above mentioned statute of 13 Geo. 3. c. 78. par. 45. "That if upon application of the surveyor of the highways for any parish, township, or place, to the justices of the peace for the limit wherein such parish, township, or place, lieth, at their

Vide the case of
the King v.
Inh. of Newton
in Cheshire.

" general

In what manner
an assessment
may be made.

“ general or quarter sessions of the peace, or at some special
“ sessions for the highways, the said justices shall be fully sa-
“ tisfied, by proof upon oath, that the duty directed to be
“ performed, and the money authorised to be collected and
“ received, has been performed, applied, and expended, ac-
“ cording to the directions of this act, or shall be fully satis-
“ fied that the common highways, bridges, causeways,
“ streets, or pavements, belonging to such parish, town-
“ ship, or place, are so far out of order that they cannot be
“ sufficiently amended and repaired, paved, cleansed, and
“ supported, by the means herein-before prescribed, (notice
“ being first given of such intended application at the church
“ or chapel of such parish, township, or place, on some *Sun-*
“ *day* preceding such quarter or special sessions; or if the
“ place be extraparochial, notice in writing being first given
“ of such intended application to some of the principal inha-
“ bitants residing in such extraparochial place, a week at least
“ before such general or special sessions); and then, and in
“ any of the said cases, an equal assessment upon all and
“ every the occupier of lands, tenements, woods, tithes, and
“ hereditaments, within any such parish, township, or place,
“ shall or may be made and collected by such person and per-
“ sons, and allowed in such manner, as the said justices, by
“ their order, at such general or special sessions, shall direct
“ and appoint in that behalf; and the money thereby raised
“ shall be employed and accounted for, according to the or-
“ ders and directions of the said justices, for and towards the
“ amending, repairing, paving, cleansing, and supporting
“ such highways, causeways, streets, pavements, and bridges,
“ from time to time, as need shall require.

Not to exceed
9d. in the
pound.

† *Stat.* 22. And it is further enacted by the same statute, par.
46. “ That the assessment herein-last before authorised, and
“ the assessment herein-before authorised, for buying mate-
“ rials, making satisfaction for damages, erecting guide-posts,
“ and paying the surveyor’s salary, (*vide post.*) shall not to-
“ gether in any one year exceed the rate of nine-pence in the
“ pound of the yearly value of the lands, tenements, woods,
“ tithes, and hereditaments, so to be assessed.

N. B. The pro-
visions of 3 & 4
W. & M. upon
this subject were
repealed in the
former edition,
but that statute
is repealed by
7 Geo. 3. c. 42.

† *Stat.* 23. As to the third point, *viz.* What other provisions
have been made to this purpose, it is enacted by the said sta-
tute of 13 Geo. 3. c. 78. par. 47. “ That no fine, issue,
“ penalty, or forfeiture, for not repairing the highways, or
“ not appearing to any indictment or presentment for not re-
“ pairing the same, shall hereafter be returned into the Court
“ of Exchequer, or other court, but shall be levied by and
“ paid into the hands of such person or persons residing in or
“ near the parish, township, or place, where the road shall
“ lie, as the court imposing such fines, issues, penalties, or
“ forfeitures, shall order and direct, to be applied towards the
“ repair

" repair and amendment of such highways; and the person
 " or persons so ordered to receive such fine shall, and is here-
 " by required to receive, apply, and account for the same,
 " according to the direction of such court, or, in default
 " thereof, shall forfeit double the sum received; and if any
 " fine, issue, penalty, or forfeiture, to be imposed on any
 " such parish, township, or place, for not repairing the high-
 " ways, or not appearing as aforesaid, shall hereafter be levied
 " on any one or more of the inhabitants of such parish, town-
 " ship, or place, that then such inhabitant or inhabitants
 " shall and may make his or their complaint to the justices of
 " the peace, at their special sessions; and the said justices are
 " hereby empowered and authorised, by warrant under their
 " hands and seals, to cause a rate to be made, according to
 " the form and manner herein last before prescribed, for the
 " reimbursing such inhabitant or inhabitants the monies so le-
 " vied on him or them as aforesaid; which rate so made,
 " and confirmed by any two justices, shall be collected and
 " levied by the surveyor of the highways of such parish, town-
 " ship, or place, so presented or indicted, as aforesaid; and
 " the said surveyor shall, within one month next after the
 " making and confirming the rate aforesaid, collect, levy,
 " and pay unto such inhabitant or inhabitants the money so
 " levied on him or them as aforesaid." (10)

Fines, &c. how
levied and
applied.

(10) If a parish consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the court will consider it as being substantially the conviction of the one district, and if the fine be levied on an inhabitant of the other, will grant a *mandamus* for a rate to be levied on the district bound to repair the indicted part of the road. But the *mandamus* must be special, suggesting that the part of the highway, which was the subject of the indictment, lay wholly in the township indicted, and that the two townships were separately bound to repair their respective parts of the highway, in order to afford the indicted township an opportunity of traversing the facts. Douglas 423. Strange 211.

SECT. 24. Also the later statutes (a) which have imposed any penalties on surveyors of the highways, or others, for any offences relating to the highways, have generally ordained that the whole, or part thereof, shall be applied to the repairs of the highways of the places wherein the offence shall be committed, as will more fully appear in the subsequent part of this chapter.

(a) This re-
lates to the sta-
tutes now re-
pealed.

† SECT. 25. As to the fourth point, *viz.* In what manner the profits of lands settled in trust for the repairs of the highways shall be employed, it is enacted by the above mentioned statute of 13 Geo. 3. c. 78. par. 52. " That where any lands
 " have been, or shall be given, for the maintenance of cause-
 " ways, pavements, highways, and bridges, all such persons
 " who are, or shall be seised or trusted with any such
 " lands, shall let them to farm at the most improved yearly
 " value, without fine; and that the justices of the peace, in
 " their

The 22 Car. 2.
c. 12. s. 2. re-
cited in the for-
mer edition is
repealed by
7 Geo. 3. c. 42.

On payment of money assessed the ground to be deemed a publick highway.

Where there is not money sufficient assessments may be raised by order of the justices of the quarter sessions.

“ and likewise such recompence as they shall think reasonable,
 “ for the making of new ditches and fences on the side or
 “ sides of the said highways that shall be so enlarged or diver-
 “ ted, and also satisfaction to any person or persons, bodies
 “ politick or corporate, that may be otherwise injured by the
 “ enlarging or diverting the said highways respectively: and
 “ upon payment or tender of the money so to be awarded and
 “ assessed to the person or persons, bodies politick or corpo-
 “ rate, intituled to receive the same, or leaving it in the hands
 “ of the clerk of the peace of such limit, in case such person
 “ or persons, bodies politick or corporate, cannot be found,
 “ or shall refuse to accept the same, for the use of the owner
 “ of, or others interested in, the said ground, the interest of
 “ the said person or persons, bodies politick or corporate,
 “ in the said ground, shall be for ever divested out of them,
 “ and the said ground, after such agreement or verdict as
 “ aforesaid, shall be esteemed and taken to be a publick high-
 “ way, to all intents and purposes whatsoever; saving never-
 “ theless to the owner or owners of such ground all mines,
 “ minerals, and fossils, lying under the same, which can or
 “ may be got without breaking the surface of the said high-
 “ way; and also all timber and wood growing upon such
 “ ground, to be fallen and taken by such owner or owners
 “ within one month after such order shall have been made, or
 “ in default thereof, to be fallen by the said surveyor or sur-
 “ veyors, within the respective months aforesaid, and laid
 “ upon the land adjoining, for the benefit of the said owner
 “ or owners: and where there shall not appear sufficient
 “ money in the hands of the surveyor or surveyors, for the
 “ purposes aforesaid, then the said two justices, in case of
 “ agreement, or the said court of quarter sessions, after such
 “ verdict as aforesaid, shall order an equal assessment to be
 “ made, levied, and collected, upon all and every the occu-
 “ piers of lands, tenements, woods, tithes, and hereditaments,
 “ in the respective parishes, townships, or places, where such
 “ highways shall lie, and direct the money to be paid to the
 “ person or persons, bodies politick or corporate, so interested,
 “ in such manner as the said justices, or court of quarter ses-
 “ sions respectively, shall direct and appoint: and the money
 “ thereby raised shall be employed and accounted for, accord-
 “ ing to the order and direction of the said justices, or court
 “ of quarter sessions respectively, for and towards the purcha-
 “ sing the land to enlarge or divert the said highways, and for
 “ the making the said ditches and fences, and also satisfaction
 “ for the damages sustained thereby; and the said assessment,
 “ if not paid within ten days after demand, shall, by order of
 “ the said justices, or court of quarter sessions respectively,
 “ be levied by the said surveyor, in the manner herein-after
 “ mentioned: provided that no such assessment to be made
 “ in

“ in any one year shall exceed the rate of sixpence in the pound of the yearly value of the lands, tenements, woods, tithes, and hereditaments, so assessed.”

Not exceeding
6d. in the
pound.

† *Stat.* 29. And it is further enacted by the said statute, par. 17. “ That when any such new highways shall be made as aforesaid, the old highway shall be stopped up, and the land and soil thereof shall be sold by the said surveyor, with the approbation of the said justices, to some person or persons whose lands adjoin thereto, if he, she, or they, shall be willing to purchase the same; if not to some other person or persons, for the full value thereof: but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of such justices respectively, be accommodated with a convenient way and passage from such new highway, which they are hereby authorised to order and lay out, if they find it necessary; then, and in such case, the said old highway shall only be sold subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect; and the money arising from such sale, in either of the said cases, shall be applied towards the purchase of the land where such new highway shall be made: and, upon payment or tender of the money so to be agreed for as aforesaid, and upon a certificate being signed by the said two justices, or by the chairman of the said court of quarter sessions, in case the same shall be determined there, describing the lands so sold, and expressing the sum so agreed for, and directing to whom the same shall be paid, and upon the purchaser’s taking a receipt for such purchase-money from the person intitled to receive the same, by an indorsement on the back of such certificate, the soil of such old highway shall become vested in such purchaser and his heirs; but all mines, minerals, and fossils, lying under the same, shall continue to be the property of the person or persons who would, from time to time, have been intitled to the same, if such old highway had continued there.”

Old highway
and soil may be
sold by the sur-
veyor, subject
to ancient right
of way and
passage.

Mines and mi-
nerals reserved
to the owners.

† *Stat.* 30. And it is also enacted, par. 18. “ That in case such jury shall give in and deliver a verdict for more monies, as a recompence for the right, interest, or property, of any person or persons, bodies politick or corporate, in such lands or grounds, or for the making such fence, or for such damage or injury to be sustained by him, her, or them respectively, as aforesaid, than what shall have been proposed and offered by the said surveyor, before such application to the said court of quarter sessions as aforesaid; that then, and in such case, the costs and expences attending the said several proceedings shall be borne and paid by the sur-
VOL. I. C c “ surveyor

Costs of pro-
ceedings by
whom payable.

“veyor of the said highway, out of the monies in his or their hands, or to be assessed and levied by virtue and under the powers of this act; but if such jury shall give and deliver a verdict for no more, or for less monies than shall have been so offered and proposed by the said surveyor before such application to the said court of quarter sessions; that then the said costs and expences shall be borne and paid by the person or persons, bodies politick or corporate, who shall have refused to accept the recompence and satisfaction so offered to him, her, or them, as aforesaid.”

(13) The fact of non-repair is traversable when a justice presents a highway on his own view. *Rex v. Jus. Wilts.* 3 Black. 467.

† *Stat. 31.* And it is also further enacted by the said statute, par. 19. “That when it shall appear, upon the view (13) of any two or more of the said justices of the peace, that any publick highway, not in the situation herein-before described, or publick bridleway or footway, may be diverted, so as to make the same nearer or more commodious to the publick, and the owner or owners of the lands and grounds through which such new highway, bridleway, or footway, is proposed to be made, shall consent thereto, by writing under his or their hand and seal, or hands and seals, it shall and may be lawful, by order of such justices, at some special sessions, to divert and turn, and to stop up such footway, and to divert, turn, and stop up, and inclose, sell, and dispose of such old highway or bridleway, and to purchase the ground and soil for such new highway, bridleway, or footway, by such ways and means, and subject to such exceptions and conditions, in all respects, as herein-before mentioned with regard to highways to be widened or diverted; and where any such highway, bridleway, or footway, herein last before described, shall be so ordered to be stopped up or inclosed, and such new highway, bridleway, or footway, set out and appropriated in lieu thereof, as aforesaid, shall and may be lawful for any person or persons injured or aggrieved by any such order or proceeding, or by the inclosure of any road or highway, by virtue of any inquisition taken upon any writ of *ad quod damnum* to make his or their complaint thereof, by appeal (14) to the jus-

(14) Though the appeal is directed to the next quarter sessions, yet the justices may adjourn the quarter sessions itself to another day, or they may adjourn the particular matter to a subsequent sessions. And this appeal was thought by Lord Hardwicke to be a waiver to any objection of surprise, with respect to the male execution of the writ of *ad quod damnum*; for the statute has put the justices in the room of the traverse, and if the party instead of appealing had traversed the inquisition and issue had been taken on it and a verdict found, he could not have applied to the court of Chancery upon a suggestion of surprise, and a fraudulent and clandestine execution of the writ. And even upon such an enquiry, the court will not regard any complaint upon the ground of public inconvenience, for that would be setting up a jurisdiction in opposition to a jurisdiction appropriated by the act of parliament to the quarter sessions only: but if a jury have manifestly done contrary to the general good of the country, it may afford a strong corroborating evidence of surprise. 3 Atk. 770.—N. B. It is not necessary for the sheriff to give formal notice of the execution of the writ; it is sufficient if the jury be summoned impartially, and the inquisition be made in a fair and open manner.

“ tices

" tices of the peace, at the next general quarter sessions,
 " which shall be holden within the limit where the same shall
 " lie, after such order made, or proceeding had, as aforesaid,
 " upon giving ten days notice, in writing, of such appeal
 " to the surveyor and party interested in such inclosure, if
 " there shall be sufficient time for that purpose; if not, such
 " appeal may be made upon the like notice to the next sub-
 " sequent quarter sessions of the peace; which courts of
 " quarter sessions are hereby respectively authorised and im-
 " powered to hear and finally determine such appeal; and
 " if no such appeal be made, or, being made, such order
 " and proceedings shall be confirmed by the said court, the
 " said inclosures may be made, and the said ways stopped,
 " and the proceedings thereupon shall be binding and con-
 " clusive to all persons whomsoever; and the new highway,
 " bridleway, or footway, so to be appropriated and set out,
 " shall be, and for ever after continue, a publick highway,
 " bridleway, or footway, to all intents and purposes what-
 " soever; but no inclosures of such old highways or bridle-
 " way, or stoppage of such footway, shall be made, until such
 " new highways, bridleway, or footway, shall be completed,
 " and put into good condition and repair, and so certified by
 " two justices of the peace, upon view thereof, which certi-
 " ficate shall be returned to the clerk of the peace, and in-
 " rolled amongst the records of sessions; but from and after
 " such certificate, such old highways, bridleway, or footway,
 " shall and may be stopped up, and the soil of such old high-
 " ways or bridleway sold, in the manner, and subject to the
 " reservations and restrictions herein-before mentioned with
 " respect to highways to be enlarged or diverted by virtue of
 " this act: and where any highway, bridleway, or footway,
 " hath been diverted and turned above twelve months, either
 " from necessity, where the same have been destroyed by
 " floods, or slips of the ground on which they were made,
 " or from other causes and motives, if new highways, bri-
 " dleways, or footways, have been made in lieu thereof,
 " nearer or more commodious to the publick, and the same
 " have been acquiesced in, and no suit or prosecution hath
 " been commenced for the diverting or turning the same,
 " every new highway, bridleway, or footway, set out and
 " used in the place of that so diverted and turned, shall from
 " henceforth be the publick highway, bridleway, or foot-
 " way, to all intents and purposes whatsoever; and all per-
 " sons liable to the repair of any such old highways, bridle-
 " way, or footway, so diverted and turned, or to be diverted
 " and turned, as aforesaid, shall, in the same manner, be and
 " continue liable to the repair of such new highways, bri-
 " dleway, or footway, except where any agreement shall
 " have been made relative to such repairs between the parties

Concerning
ways diverted
above twelve
months.

Vide Douglas

749.

R. R. H.

2 Shower 28.

Levinz 1234.

W. Jones 296.

Id. Raym. 725.

Godbolt 4, 52.

3 Comm. p. 36.

Com. 1 Chimin

D. 6.

“interested therein, which hath laid the burthen thereof,
 “or any part thereof, upon any other person or persons, in
 “which case the same shall be observed.”

How the old
 highways or the
 lands lying be-
 tween the fences
 inclosing the
 same shall be
 disposed of.

† *Sec. 32.* But it is provided by the said statute, par 20.
 “That no common land, lying between the fences of any
 “old highway to be stopped up or inclosed by virtue of this
 “act, shall be inclosed; and where the land lying between
 “the fences of such highway, not being common land, shall,
 “upon a medium, exceed thirty feet in breadth, and not ex-
 “tend to fifty feet in breadth, the same shall not be stopped
 “up or inclosed, until satisfaction shall be made to the owner
 “of such land, for so much thereof as shall exceed the said
 “breadth of thirty feet; and if the parties cannot agree in the
 “satisfaction so to be made, the same shall be adjusted by the
 “said justices, or the jury, if a jury shall be impanelled; and if
 “the land between the fences inclosing such highways, not
 “being common land, shall exceed fifty feet in breadth upon
 “a medium, or if the said old road, so to be diverted or
 “turned, shall lie through the open field or ground belonging
 “to any particular person or persons, such person or persons,
 “and also the person or persons intitled to the land between the
 “fences on the side of such highway, shall respectively hold and
 “enjoy the land and soil of such old highway, and pay to the
 “surveyor, for the use of the highways, so much money as
 “shall be agreed upon between the parties; or if they can-
 “not agree, so much as shall be deemed and adjudged by the
 “said justices, or jury, if such jury shall be impanelled as
 “aforesaid, to be adequate to the purchase of it, estimating
 “such highway at thirty feet in breadth, upon an average.

Where old foot-
 ways are stop-
 ped up, and new
 ones laid out, in
 what manner
 the owners of
 the lands shall
 make and re-
 ceive satisfac-
 tion.

† *Sec. 33.* And it is further enacted, par. 21. “That
 “where any footway shall be diverted by virtue of this act
 “through the land belonging to the same person who owned
 “the land through which such old footway lay, the same shall
 “be adjudged and deemed an exchange only, and no satisfac-
 “tion or compensation shall be made, unless the land to be
 “used for such new footway shall be of greater length, and
 “of greater value, than the land used for such old footway;
 “and where the said footway shall not be turned through the
 “lands belonging to the same person, the damage occasioned
 “by such old footway to the lands through which it lay, if the
 “parties interested shall not agree in adjusting the same, shall
 “be adjudged by two indifferent persons, the one to be named by
 “the owner of the land, and the other by the said two justices;
 “and if the persons so to be nominated cannot agree therein,
 “they shall chuse some third person to adjudge the same, whose
 “determination shall be final; and the money at which such
 “damages shall be assessed shall be applied in making satis-
 “faction

“ faction to the owner or owners of the land through which
 “ such new footway shall be made.

† *Sett.* 34. And it is further enacted by the said statute, par. 22. “ That if in any parish, township, or place,
 “ where any highway shall be diverted and turned by virtue
 “ of this act, it shall appear to the justices, who are hereby
 “ authorised to view or inquire into the same, that there are
 “ other highways within such parish, township, or place,
 “ besides that so to be diverted and turned, which may, with-
 “ out inconvenience to the publick, be diverted into such new
 “ highway hereby authorised to be made, or into any other
 “ highway or highways within such parish, township, or place,
 “ and the charge of repairing such highway or highways
 “ may be thereby saved to such parish, township, or place;
 “ it shall and may be lawful for such justices to order such
 “ highway or highways, which shall appear to them unneces-
 “ sary, to be stopped up, and the soil thereof sold, in such
 “ manner, and subject to such restrictions, and such right of
 “ appeal to the party or parties aggrieved thereby, as are
 “ herein-before respectively directed and given concerning the
 “ highways to be stopped up or inclosed.”

Justices to order
unnecessary
highways to be
stopped up.

† *Sett.* 35. As to the fourth general Head of this Chapter, *viz.* In what manner the surveyors of the highways shall be appointed, it is enacted by the 13 Geo. 3. c. 78. s. 1.
 “ That upon the twenty-second day of September, in every
 “ year, unless that day shall be Sunday, and then on the day
 “ following, the constables, headboroughs, tythingmen,
 “ churchwardens, surveyor of the highways, and household-
 “ ers, being assessed to any parochial or publick rate of
 “ every parish, township, or place, shall assemble to-
 “ gether at the church or chapel, or if there shall be
 “ no church or chapel, then at the usual place of pub-
 “ lick meetings for such parish, township, or place, at
 “ the hour of eleven in the forenoon; and the major part
 “ of them, so assembled, shall make a list of the names of
 “ at least ten persons living within such respective parishes,
 “ townships, or places, who, each of them have an estate in
 “ lands, tenements, or hereditaments, lying within such re-
 “ spective parish, township, or place, in their own right, or
 “ in the right of their wives, of the value of ten pounds by
 “ the year; or a personal estate of the value of one hundred
 “ pounds; or are occupiers or tenants of houses, lands, te-
 “ nements, or hereditaments, of the yearly value of thirty
 “ pounds: and if there shall not be ten persons having such
 “ qualifications as aforesaid, then they shall insert in such list
 “ the names of so many of such persons as are so qualified,
 “ as above required, together with the names of so many of

On the 22d
Sept. yearly a list
of ten persons to
be made, &c.

Qualifications of surveyors.
A duplicate of such list shall be transmitted to one of the justices, and the original list to the special sessions, &c.

Notices to the persons contained in the list.

The justices are to give 10 days notice of holding special sessions to the constables, &c. and may appoint qualified surveyors from the list, or other inhabitants, &c.

(15) The court will not compel the justices to appoint a surveyor out of the list returned to them by the parish, if such list has been procured by indirect and fraudulent means, at a riotous assembly of the

lower sort of people, but they seemed to incline very strongly that it was not absolutely necessary that the constable, headborough, tythingman, &c. as mentioned in the act, should be present, but that the legislature only meant it to be a full parochial meeting, without intending that each of these bodies should be such essential constituent parts of it, that the acts of the meeting would be annulled and made void by the absence of those officers. 4 Burr. 2454.

“ the most sufficient and able inhabitants of such parish, town-
“ ship, or place, not so qualified, as shall make up the num-
“ ber ten, if so many can be found; if not, so many as shall
“ be there resident, to serve the office of surveyor of the
“ highways: and the constable, headborough, or tything-
“ man, of such parish, township, or place, shall, within
“ three days after such meeting, transmit a duplicate of such
“ list to one of the justices of the peace within the limit of
“ the county, riding, division, hundred, city, corporation,
“ precinct, or liberty, where such parish, township, or place,
“ shall lie, living in or near the same; and shall also return
“ and deliver the original list, made and agreed upon at such
“ meeting, to the justices of the peace, at their special sessions
“ to be held for the highways within that limit, in the week
“ next after the Michaelmas general quarter sessions of the
“ peace in every year; and shall also, within three days after
“ making the said list, give personal notices to, or cause no-
“ tices in writing to be left at the places of abode of, the se-
“ veral persons contained in such list, informing them of
“ their being so named, to the intent that they may severally
“ appear before the justices at the said special sessions, to ac-
“ cept such office, if they shall be appointed thereto, or to
“ shew cause, if they have any, against their being ap-
“ pointed: and the said justices are hereby authorised and re-
“ quired to hold such special sessions at such convenient place
“ or places, within their respective limits, as they, in their
“ discretion, shall judge proper; and to give notice of the
“ time and place where they intend to hold the same, to the
“ constables, headboroughs, or tythingmen, of every such
“ parish, township, or place, at least ten days before the
“ holding of the said session; and the said justices, then and
“ there, from the said lists, according to their discretion, and
“ the largeness of the parish, township, or place respectively,
“ by warrant under their hands and seals, shall appoint (15) one,
“ two, or more, of such persons as aforesaid, if he or they
“ shall, in the opinion of such justices, be qualified for the
“ office of surveyor; if not, one, two, or more of the other
“ substantial inhabitants or occupiers of lands, tenements,
“ woods, tithes, or hereditaments, within such parish, town-
“ ship, or place, living within three miles thereof, and with-
“ in the same county, fit and proper to serve the office of
“ surveyor of the highways for such parish, township, or
“ place, if any such can be found; which appointment shall,
“ by the constables, headboroughs, or tythingmen aforesaid,

“ be notified to every person so appointed by the said justices,
 “ within three days after such appointment, by serving him
 “ with the said warrant, or by leaving the same, or a true
 “ copy thereof, at his house, or usual place of abode; and
 “ every person so appointed, if he accepts the said office, shall
 “ be surveyor of the highways for the said parish, township,
 “ or place, for the year ensuing, and shall take upon him,
 “ and duly execute the office aforesaid; and the said justices
 “ shall then and there give such of the said surveyors as shall
 “ personally appear before them a charge, for the better per-
 “ formance of their duty, according to the directions of this
 “ act: and if any of the said persons, so appointed, whose
 “ names were contained in such list, and who were served
 “ with the said notice, shall refuse or neglect to appear at the
 “ said special sessions, and accept the said office, if appointed
 “ thereto, in manner aforesaid, or shall not, within six days
 “ after being served with such warrant of appointment,
 “ signify his acceptance thereof, either in person or by
 “ writing, to one of the said justices, he shall forfeit five
 “ pounds; and in case any person so appointed by the said
 “ justices, whose name was not contained in such list, shall
 “ refuse or neglect to accept the said office, or shall not, with-
 “ in six days after being served with such appointment, shew
 “ to one of the justices signing such appointment suf-
 “ ficient cause why he should not serve such office, he shall
 “ forfeit fifty shillings: provided that no person who
 “ hath been appointed and served the office of surveyor for
 “ one year, shall be liable to be appointed surveyor for the
 “ same parish, township, or place, within three years from
 “ the time of such first appointment and service, unless he
 “ shall consent thereto; but if no such list shall be made and
 “ returned, or if the said justices shall make such appoint-
 “ ment as aforesaid, and the person or persons so appointed
 “ shall refuse to serve the said office, the said justices, or any
 “ two of them, shall and may, and are hereby required, at
 “ the said special sessions, or at some subsequent special ses-
 “ sions, to be held within one month after, to nominate and
 “ appoint some other person or persons to be surveyor of such
 “ parish, township, or place, whom they shall judge proper
 “ to execute that office, and shall and may fix such salary to
 “ be paid to such surveyor, to be appointed as herein last be-
 “ fore mentioned, out of the said forfeitures, and all other
 “ forfeitures, fines, penalties, assessments, and compositions,
 “ to be paid, levied, and raised, under the authority of this
 “ act, within such parish, township, or place respectively,
 “ as such justices shall think fit, not exceeding one eighth part
 “ of what shall have been raised by an assessment of sixpence
 “ in the pound, for the use of the highways within such pa-
 “ rish, township, or place, where any such assessment shall

Which appoint-
ment shall be
notified by the
constables.

And the sur-
veyor hold his
office for a year.

Penalty on re-
fusing to serve.

No person who
hath served one
year, to serve
again within 3
years for same
place, without
his consent.

If no such list
be made, or the
person appoint-
ed refuse to
serve, another
person may be
appointed at a
subsequent spe-
cial sessions,
and a salary
fixed.

Assessments to
be returned in
writing.

Penalty on
constables.

How the assis-
tant surveyor is
to be appointed,
penalty for re-
fusing to serve,
and the appoint-
ment of another
in his stead.

“ have been raised, and observing the same restriction, as
“ near as they can, from the best information they shall be
“ able to get of the probable amount of such an assessment,
“ where none hath been already made; and the said justices
“ shall and may, if they think fit, require the constables,
“ headboroughs, tythingmen, and surveyor, of every such
“ parish, township, and place, or any of them, to return to
“ them, at such time and place as they shall appoint, an ac-
“ count, in writing, of the sum which such assessment of fix-
“ pence in the pound hath raised, or will, in his or their
“ opinion, raise within such parish, township or place: and
“ if the constables, headboroughs, tythingmen, church-
“ wardens, surveyors of the highway, and such householders
“ as aforesaid, of any parish, township or place, shall ne-
“ glect or refuse to make such list as aforesaid; or if the con-
“ stable, headborough or tythingman, of any parish, town-
“ ship, or place, shall not return the said list of names,
“ when made, and such duplicate thereof as aforesaid, and
“ give such notice or notices, and serve such warrant or
“ warrants as in this act is directed; or if the said constable,
“ headborough, tythingman, and surveyor, or any of
“ them, shall neglect to return such account of the amount
“ of such assessment as aforesaid; when so required as afore-
“ said, every constable, headborough, tythingman, church-
“ warden, or surveyor, so neglecting or refusing, in any of the
“ said cases, shall, for every such default respectively, forfeit
“ the sum of forty shillings.

† And it is further enacted by the said statute, par. 2. “ That
“ in all cases where the said justices, upon neglect, or refusal
“ of the person so nominated surveyor as aforesaid to accept
“ the said office, shall appoint any other person for such sur-
“ veyor, with a salary as aforesaid, the said justices shall, and
“ are hereby required to appoint one substantial inhabitant of
“ such parish, township, or place, for assistant to such sur-
“ veyor, in the several matters, and for the several purposes
“ hereafter mentioned, until the next annual appointment of
“ surveyors, according to the directions of this act; and
“ if the person so appointed assistant shall, upon notice of
“ such appointment, refuse to accept that office, he shall for-
“ feit the sum of fifty shillings: and, in that case, it shall and
“ may be lawful for such justices to appoint any other sub-
“ stantial inhabitant of such parish, township, or place, for
“ assistant to such surveyor, in manner and for the time afore-
“ said; and if such second appointed assistant shall decline or
“ refuse to accept the said office, he shall, in like manner,
“ forfeit the sum of fifty shillings; and the said justices shall
“ and may appoint any other person, inhabiting in such parish,
“ town-

“ township, or place, assistant to such surveyor, who shall be
 “ intitled to the said forfeitures herein last before mentioned,
 “ and also to some further allowance by way of salary, (to be
 “ paid as the surveyor’s salary is hereby directed to be paid),
 “ if the said justices shall think any such salary necessary, and
 “ shall order the same, which they are hereby authorized to
 “ do: provided, that no person so appointed assistant for one
 “ year shall be liable to be appointed assistant for the same pa-
 “ rish, township, or place, within three years next following
 “ such first appointment, without his consent.

† And further, by par. 3. “ That the surveyor of every pa-
 “ rish, township, and place, who shall not reside therein, but
 “ shall be appointed with such salary as aforesaid, shall, if re-
 “ quired by the churchwarden, overseer of the poor, or any
 “ principal inhabitant of the parish, township, or place, for
 “ which he shall be so appointed surveyor, at the time of his
 “ appointment, or within fourteen days after, give a bond
 “ upon paper, without stamp thereupon, to some proper
 “ person within such parish, township, or place, to be no-
 “ minated by the said justices, with sufficient surety, to ac-
 “ count for the money which shall come to his hands as sur-
 “ veyor, according to the directions of this act; which bond
 “ shall be good and effectual in law.

The surveyor to
 give bond for the
 money he shall
 receive.

† *Sec.* 36. And it is further enacted by the said statute, par. 5.
 “ That if two parts out of three of those so to be assembled
 “ in any such parish, township, or place, for the nomination
 “ of surveyors, shall agree in the choice of any particular per-
 “ son of skill and experience, to serve the said office, and in
 “ the settling of a certain salary for his trouble therein, and
 “ shall return the name of such person, together with the list
 “ herein-before directed, to the sessions, to be held in the
 “ week next after the Michaelmas quarter sessions; the said
 “ justices, if they shall think proper, may appoint such per-
 “ son to be surveyor for such parish, township, or place, and
 “ allow him the salary mentioned in such agreement, which
 “ shall be raised and paid in the same manner as the salary
 “ herein-before mentioned is directed to be raised and paid;
 “ and in case any surveyor to be appointed under the authority
 “ of this act shall die, or become incapable of executing that
 “ office, before such next special sessions for appointing sur-
 “ veyors, the said justices, or any two of them, shall and
 “ may, at some special sessions, nominate and appoint such
 “ person or persons as they shall think proper, to execute the
 “ said office, until such next special sessions for appointing
 “ surveyors, as aforesaid; and, if such deceased surveyor had
 “ a salary, they may allow the same salary to his successor, in
 “ pro-

How the justices
 shall appoint the
 surveyor elected
 by the inhabi-
 tants.

“ proportion to the time he shall serve the said office; and if
 “ the said justices of the peace, at their said special sessions,
 “ or at any time afterwards, pursuant to the powers of this
 “ act, shall appoint more than one person for surveyor of any
 “ parish, township, or place, all and every person or persons
 “ so appointed, shall be comprehended under the word *Sur-*
 “ *veyor* in every part of this act.

Justices of ci-
 tics, &c. only
 to allow such sa-
 laries as shall be
 fixed by inha-
 bitants.

† Provided, by par. 55. “ That nothing in this act con-
 tained shall authorise or impower, or be deemed, construed,
 “ or taken to authorise and impower, any justice or justices
 “ of the peace, for any city, town corporate, or borough, to
 “ fix or allow any salary to or for any surveyor to be appoint-
 “ ed by any such justice or justices, other than and except such
 “ salary as shall be settled and agreed upon by two parts out of
 “ three of the persons assembled in the parish, township, or
 “ place, within such city, town corporate, or borough, for
 “ which such surveyor shall be appointed, pursuant to the di-
 “ rections of this act.

† *Seet.* 37. As to the fifth general Head of this Chapter,
viz. In what manner the surveyors of the highways ought to
 execute their office, it is enacted by the same statute of
 13 Geo. 3. c. 78. f. 4. “ That the assistant, so to be no-

(16) Vide Sup.
 p. 392.

Duty of the as-
 sistant surveyor.

“ minated and appointed, (16) shall assist the said surveyor,
 “ whenever requested by him, in calling in and attending the
 “ performance of the statute-duty; in collecting the compo-
 “ sitions, fines, penalties, and forfeitures; in making and
 “ collecting the assessment; in making out and serving the
 “ notices authorised by this act; and in such other matters
 “ and things as shall be reasonably required of him by the
 “ surveyor, in the execution of his office as surveyor, pur-
 “ suant to this act: and the said assistant shall account with,
 “ and pay to, the surveyor, or to his order, all the money
 “ which shall come to his hands as assistant, by the means
 “ as aforesaid; and, in default thereof, he shall forfeit double
 “ the value of the money by him so received, and not so paid
 “ and accounted for; and if the said assistant shall wilfully ne-
 “ glect or make default in the performance of any of the duty
 “ required from him by this act, he shall forfeit, not exceed-
 “ ing five pounds, nor less than forty shillings, at the discre-
 “ tion of the justice or justices of the limit within which such
 “ assistant shall be appointed: and the said surveyor shall send
 “ orders, in writing, upon the said assistant, for the pay-
 “ ment of all sums due to any person or persons, for work or
 “ materials, which amount to forty shillings, or upwards;
 “ and the said surveyor shall not be responsible for any sum or
 “ sums of money which shall be received by the said assis-
 “ tant, and shall not be actually paid to such surveyor, or to
 “ his order as aforesaid.

Seet.

† *Self.* 38. And also, it is further enacted by the said statute, par. 12. " That the surveyors shall, as they shall judge proper, view all the common highways, trunks, tunnels, plats, hedges, ditches, banks, bridges, causeways, and pavements, within the parish, township, or place, for which they shall be appointed surveyors; and in case they shall observe any nuisances, encroachments, obstructions, or annoyances, made, committed, or permitted, in, upon, or to the prejudice of them, or any of them, contrary to the directions of this act, they shall give, or cause to be given, to any person or persons, doing, committing, or permitting the same, personal notice, or notice in writing, to be left at his, her, or their usual place or places of abode, specifying the particulars wherein such nuisances, defaults, obstructions, or annoyances, consist; and if such nuisances, obstructions, or annoyances shall not be removed, and the ditches, drains, gutters, and water courses aforesaid effectually made, scoured, cleansed, and opened, and such trunks, tunnels, plats, and bridges, made and laid, and such hedges properly cut and pruned, within twenty days after such notice of the same respectively given as aforesaid, then the said surveyors shall remove such nuisances, obstructions, or annoyances, and open, cleanse, and scour such ditches, gutters, and water courses, and make or amend such trunks, tunnels, plats, or bridges, and cut and prune such hedges, for the benefit and improvement of the said highways; and the person or persons so neglecting to make or open and cleanse such ditches, gutters, or water courses, or to cut or prune such hedges, during the time aforesaid, after such notice given, shall forfeit, for every foot in length, which shall be so neglected, the sum of one penny; and the said surveyors shall be reimbursed what charges and expences they shall be at in removing such nuisances, obstructions, or annoyances, and making or opening, cleansing and scouring, such ditches, gutters, and water courses, and in making or amending such trunks, tunnels, plats, or bridges, and in cutting and pruning such hedges respectively, by the person or persons who ought to have done the same, over and above the said forfeiture; and in case such person or persons shall, upon demand, refuse or neglect to pay the said surveyor his charges and expences occasioned thereby respectively, and also the said forfeiture of one penny *per* foot, then the said surveyor shall apply to any justice of the peace, and, upon making oath before him of notice being given to the defaulter in manner aforesaid, and of the said work being done by such surveyor, and of the expences attending the same, the said surveyor shall be repaid by such person or persons all such his said charges as shall be allowed to be reasonable by the said justice; or, in

Surveyors duty in view of highway, in respect to nuisances, &c.

Vide Salk. 357. Where it was adjudged on the 22 Car. 2. c. 12. par. 12. that the justices ought to fix the particular days, and not generally appoint the time between such a day and such a day.

" de-

“ default of payment thereof on demand, the same shall be
 “ levied in such manner as the penalties and forfeitures hereby
 “ inflicted are directed to be levied.”

How highways
 by tenure, &c.
 may be ordered
 to be repaired.

† *Sec.* 39. And it is further enacted by the said statute,
 par. 23. “ That every surveyor shall give information upon
 “ oath to the said justices, or any two or more of them, of all
 “ such highways, and of all bridges, causeways, or pavements,
 “ upon such highways, as are out of repair, and ought to be
 “ repaired by any person or persons, bodies politick or corpo-
 “ rate, by reason of any grant, tenure, limitation, or appoint-
 “ ment, of any charitable gift, or otherwise howsoever; and
 “ the said justices shall limit a time for repairing the same, of
 “ which notice shall be given by the said surveyor to the occu-
 “ pier or occupiers of the lands or tenements liable to the bur-
 “ then of such repairs, or to such other person or persons, bo-
 “ dies politick or corporate, as are chargeable with the same;
 “ and if such repairs shall not be effectually made within the
 “ time so limited, the said justices shall, and are hereby requi-
 “ red to present such highways, bridges, causeways, or pave-
 “ ments, so out of repair, together with the person or persons,
 “ bodies politick or corporate, liable to repair the same, at
 “ the next general quarter sessions of the peace for the limit
 “ wherein such highway shall lie; and the justices at such
 “ quarter sessions may, if they see just cause, direct the pro-
 “ secution to be carried on at the general expence of such li-
 “ mit, and to be paid out of the general rates within the
 “ same.”

Vide 1 Black.
 602.

Justices may or-
 der which high-
 ways shall be first
 repaired.

† And it is further enacted by the said statute, par. 25. “ That
 “ the said justices, at any special sessions to be held by virtue
 “ of this act, may, by writing under their hands and seals, or-
 “ der and appoint those highways (not being turnpike road),
 “ which in their opinion do most want repair within their ju-
 “ risdiction, to be first amended, and at what time, and in what
 “ manner, the same shall be amended; according to which or-
 “ der, if such there be, all and singular the respective surveyors
 “ of the said highways are hereby required to proceed within
 “ their respective liberties.”

Direction posts
 where and how
 to be erected.

† And, for the better convenience of travellers where several
 highways meet, it is further enacted in par. 26. “ That the
 “ said justices, at some special sessions to be held for the pur-
 “ poses of this act, shall issue their precept to the surveyor of
 “ the highways for any parish, township, or place, where se-
 “ veral highways meet, and there is no proper or sufficient di-
 “ rection post, or stone, already fixed or erected, requiring him
 “ forthwith to cause to be erected or fixed, in the most conve-
 “ nient

“ nient place where such ways meet, a stone or post, with inscriptions thereon, in large legible letters, painted on each side thereof, containing the name or names of the next market town or towns, or other considerable place or places; to which the said highways respectively lead; and also at the several approaches or entrances to such parts of any highways as are subject to deep or dangerous floods, graduated stones or posts, denoting the depth of water in the deepest part of the same, and likewise such direction posts, or stones, as the said justices shall judge to be necessary, for the guiding of travellers in the best and safest tract through the said floods or waters; and the said surveyor shall be reimbursed the expences of providing and erecting the same respectively out of the monies which shall be received by him or them, pursuant to the directions of this act; and in case any surveyor shall, by the space of three months after such precept to him directed and delivered, neglect or refuse to cause such stones or posts to be fixed, as aforesaid, every such offender shall forfeit the sum of twenty shillings.”

† *Sec. 40.* And, for the better repairing, and keeping in repair, the said highways, and providing of materials for that purpose, it is enacted, by par. 27. “ That it shall and may be lawful to and for every surveyor, to be appointed as aforesaid, to take and carry away, or cause to be taken and carried away, so much of the rubbish or refuse stones of any quarry or quarries, lying and being within the parish, township, or place, where he shall be surveyor, (except such as shall have been got by the surveyor of any turnpike road), without the licence of the owner or owners of such quarries, as they shall judge necessary for the amendment of the said highways, but not to dig or get stone in such quarry without leave of the owner thereof; and also that it shall and may be lawful for every such surveyor, for the use aforesaid, in any waste land or common ground, river or brook, within the parish, township, or place, for which he shall be surveyor, or within any other parish, township, or place, wherein gravel, sand, chalk, stone, or other materials, are respectively likely to be found, (in case sufficient cannot be conveniently had within the parish, township, or place, where the same are to be employed, and sufficient shall be left for the use of the roads in such other parish, township, or place), to search for, dig, get, and carry away the same, so that the said surveyor doth not thereby divert or interrupt the course of such river or brook, or prejudice or damage any building, highway, or ford, nor dig or get the same out of any river or brook within the distance of one hundred feet above or below any bridge, nor within the like distance of any dam or wear; and likewise to gather stones lying upon any lands or grounds within the parish,
“ township,

Materials where
and in what
manner to be
taken.

Without making satisfaction.

But satisfaction to be made for damages done in taking them away.

Not to extend to stones thrown up by the sea, called Beach.

If sufficient materials cannot be found in waste lands, &c. the surveyor may take them from several or inclosed lands or grounds.

Making satisfaction to the owners.

“ township, or place, where such highway shall be, for such service and purpose, and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways, without making any satisfaction for the said materials; but satisfaction shall be made for all damages done to the lands or grounds of any person or persons, by carrying away the same, in the manner herein after directed, for getting and carrying materials in inclosed lands or grounds; but no such stones shall be gathered without the consent of the occupier of such lands or grounds, or a licence from a justice of peace for that purpose, after having summoned such occupier to come before him, and heard his reasons, if he shall appear and give any, for refusing his consent.”

† Provided, by par. 28. “ That nothing in this act contained, relative to the gathering or getting of stones, shall extend to any quantity of land, (being private property,) covered with stones thrown up by the sea, commonly called *beach*.”

† *Sett.* 41. And it is further enacted by the said statute, par. 29. “ That every such surveyor, for the use aforesaid, may search for, dig, and get sand, gravel, chalk, stone, or other materials, if sufficient cannot conveniently be had within such waste lands, common grounds, rivers, or brooks, in and through any of the several or inclosed lands or grounds of any person or persons whomsoever, within the parish, township, or place, where the same shall be wanted, or by licence from two justices of the peace, at a special sessions, within any other parish, township, or place, adjoining or lying near to the highway for which such materials shall be required, if it shall appear to such justices that sufficient materials cannot be conveniently had in the parish, township, or place, where such highways lie, or in the waste lands or common grounds, rivers or brooks, of such adjacent parish, township, or place, and that a sufficient quantity of materials will be left for the use of the parish, township, or place, where the same shall be, (such lands or grounds not being a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation), and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways; the said surveyor making such satisfaction for the damage to be done to such lands or grounds by the getting and carrying away the same, as shall be agreed upon between him and the owner, occupier, or other person interested in such lands or ground respectively, in the pre-

“ sence,

“ fence, and with the approbation of two or more substantial
 “ inhabitants of such parish, township, or place; and in
 “ case they cannot agree, then such satisfaction and re- In what manner
 “ compence shall be settled and ascertained by order of one or satisfaction is to
 “ more justice or justices of the peace of the limit where such be settled.
 “ land or ground shall lie: and in such places, where, from Clay may be got
 “ the want of other materials, burnt clay may be substituted in and burnt into
 “ the place thereof, it shall and may be lawful for the surveyor materials for
 “ to dig clay in such places as he is hereby authorised to dig repairing the
 “ chalk or gravel, and to dry the same upon the lands adjoin- highways.
 “ ing, and to burn the same upon any waste lands or common
 “ grounds, and to carry such clay in such manner as other ma-
 “ terials are allowed to be carried by this act, upon making
 “ such satisfaction for the damages within the several inclosed
 “ lands or grounds where such clay shall be placed or carried,
 “ as herein directed with regard to other materials: provided,
 “ that when the owner of any such inclosed lands shall have
 “ occasion for any such materials lying within the same for the
 “ repair of any highway, or other roads or ways upon his
 “ estate, or which he shall be under obligation to repair, and
 “ shall give notice to such surveyor that he apprehends there
 “ will not be sufficient for those purposes, and also for the use
 “ of the publick highways; then, and in every such case, the
 “ surveyor shall not be permitted to dig or take such materials
 “ without the consent of such owner, or an order of two jus-
 “ tices of the peace, after having summoned and heard the said
 “ owner or occupier, or his steward or agent; which justices
 “ are hereby authorised to enquire into the nature and circum-
 “ stances of the case, and to permit or restrain such power, in
 “ such manner, and under such directions, as to them shall
 “ seem just.” (17)

(17) In an order for this purpose, it is not necessary that the name of the surveyor should be mentioned, nor that any certain number of days notice should appear to have been given to the occupier of the lands. Which notice, it is sufficient to state, was *left at his place of abode*. And notice to the occupier, and not to the owner, is enough. But it is necessary expressly to allege, that materials, &c. were not to be found; and also, what materials cannot be found in the wastes, and what may be found in the private soil; for they cannot dig and try for it in the private soil; nor can they dig all over the estate for all materials, and the satisfaction ought to be awarded to the owner or occupier, or both, according to the case. 1 Burr. 382.

† *Stat. 42.* Also, it is enacted, par. 31. “ That if any sur- If pits or holes
 “ veyor, or person employed by him, shall, by reason of the are made in get-
 “ searching for, digging, or getting any gravel, sand, stones, ting materials,
 “ chalk, clay, or other materials for repairing any highways, the surveyor
 “ make, or cause to be made, any pit or hole in any such lands shall cause them
 “ or grounds, rivers or brooks, as aforesaid, wherein such ma- to be filled up
 “ terials shall be found, such surveyor, person or persons, shall or fenced off.
 “ forthwith cause the same to be sufficiently fenced off, and
 “ such fence supported and repaired, during such time as the
 “ said pit or hole shall continue open, and shall, within three
 “ days

Or forfeit 10 s.
for every ne-
glect.

And for every
neglect after no-
tice

A sum not ex-
ceeding 10 l.
nor less than
40 s.

“ days after such pit or hole shall be opened or made, where
“ no gravel, stones, or materials, shall be found, cause the
“ same to be forthwith filled up, levelled, and covered with
“ the turf or clod which was dug out of the same; and where
“ any such materials shall be found, within fourteen days af-
“ ter having dug up sufficient materials in such pit or hole,
“ cause the same to be filled up, sloped down, or fenced off,
“ and so continued; and every surveyor shall, within twenty
“ days after he shall be appointed to that office, cause all the
“ said pits and holes which shall then be open, and not likely
“ to be further useful, to be filled up or sloped down, in man-
“ ner aforesaid; and if they are likely to be further useful, he
“ shall secure the same by posts and rails, or other fences, to
“ prevent accidents to persons or cattle: and in case such sur-
“ veyor, person or persons, shall neglect to fill up, slope down,
“ or fence off, such pit or hole, in manner and within the time
“ aforesaid, he or they shall forfeit the sum of ten shillings
“ for every such default: and in case such surveyor, person or
“ persons, shall neglect to fence off such pit or hole, or to slope
“ down the same, as herein before directed, for the space of
“ six days after he or they shall have received notice for either
“ of those purposes from any justice of the peace, or from
“ the owner or occupier of such several ground, river, or
“ brook, or any person having right of common within such
“ common or waste lands, as aforesaid, and such neglect and
“ notice shall be proved upon oath before one or more of the
“ said justices of the peace, such surveyor, person or persons,
“ shall forfeit and pay any sum not exceeding ten pounds, nor
“ less than forty shillings, for every such neglect; to be de-
“ termined and adjudged by such justice or justices, and to be
“ laid out and applied in the fencing off, filling up, or sloping
“ down, such pit or hole, and toward the repair of the roads
“ in the parish, township, or place, where the offence shall
“ be committed, in such manner as the said justice or justices
“ shall direct and appoint; which forfeiture, in case the same
“ be not forthwith paid, shall be levied as other forfeitures are
“ herein after directed to be levied.”

How materials
for another pa-
rish shall be re-
moved.

† Provided by par. 32. “ That no stone, gravel, or materials,
“ to be dug for the use of any other parish, township, or place,
“ than that wherein the same are found, shall be removed or
“ carried from the place where they shall be so dug at any
“ other time than between the first day of April and the first
“ day of November, or in the time of hard frost in the winter
“ season.”

Damaging mills,
&c.

† Sect. 43. And it is further enacted, by par. 33. “ That if
“ any person shall dig, or cause to be dug, materials for the
“ highways, contrary to the direction of this act, whereby
“ any

“ any bridge, mill, building, dam, highway, ford, mines,
 “ or tin-works, may be damaged or endangered; every of-
 “ fender therein shall forfeit, for every such offence, any sum
 “ not exceeding five pounds, nor less than twenty shillings, at
 “ the discretion of the court or justices, before whom com-
 “ plaint thereof shall be made.”

† *Sec. 44.* Also it is enacted by the said statute, par. 48. The surveyor's duty is to keep books, and enter the accounts of all money paid and received.

“ That the surveyor shall collect the several assessments, for-
 “ feitures, penalties, sums of money, and compositions, to be
 “ received and taken by virtue of this act, within the year
 “ for which he is appointed surveyor, and shall keep one or
 “ more book or books, in which he shall fairly enter a just,
 “ true, and fair account of all such money as shall have come
 “ to his hands, or to the hands of the said assistant, and to
 “ whom, and on what occasion, he shall have paid or applied
 “ the same; and shall also enter in such book or books a list
 “ or lists of all such sums of money as shall then remain due
 “ and owing from any person or persons, in respect of the pay-
 “ ments, compositions, assessments, penalties, or forfeitures,
 “ to be collected, received, or taken, for and in respect of
 “ the said highways, by virtue of this act; and the said sur-
 “ veyor shall also enter an account of all tools, materials, im-
 “ plements, and other things provided, by order of the inha-
 “ bitants, at a vestry, or other publick meeting, for the repair
 “ of the said highways, at the publick expence of such pa-
 “ rish, township, or place; and shall produce such books, and
 “ the assessments made within that year unto the inhabitants
 “ to which they belong, at a vestry or other publick meeting
 “ to be held for that purpose, within fifteen days before the
 “ said special sessions so to be held in the week next after Mi-
 “ chaelmas quarter sessions, as aforesaid, to the intent that the
 “ said accounts, assessments, and lists, may be inspected by
 “ the inhabitants; and every such surveyor shall, after the said
 “ books and assessments shall have been produced at such meet-
 “ ing, take the same to such justice of the peace for the limit
 “ wherein such parish, township, or place, doth lie, and on
 “ such day, and at such hour, as shall be agreed upon at such
 “ meeting, some day after the said meeting of the inhabitants,
 “ and before such last-mentioned special sessions, and then and
 “ there verify such account, or any part thereof, upon oath,
 “ if required; and such justice may allow such account, if he
 “ finds it just, or postpone it until such special sessions, if he
 “ finds cause for so doing, in which case it may be settled and
 “ allowed at such special sessions (18) after the parts objected

And also of all money remain-
 ing due.

Also of all tools,
 materials, &c.

And shall pro-
 duce his ac-
 counts at a ve-
 stry meeting.

And afterwards
 before a justice
 of peace, who
 may allow them.

Or they may be
 further examin-
 ed and allowed,
 or disallowed, at
 the special ses-
 sions.

(18) The general quarter sessions have no original jurisdiction respecting the passing the surveyor's account, and paying over the balances to the successor. Therefore, where an order for this purpose was made at the general quarter sessions, even by the consent of the special session it was quashed; for consent cannot give original jurisdiction to a court that has only an appellate jurisdiction. 2 Burr. 746.

Books, materials, tools, &c. to be delivered to the succeeding surveyor. New surveyor authorized to collect the arrears, &c.

The surveyor liable to forfeitures for neglect of duty.

If surveyor dies, his executors, &c. shall account in the same manner. Fees to be paid to the justices clerks.

“ to by such justice shall have been explained and verified by
 “ proper evidence, to the satisfaction of the justices at such
 “ special sessions; and in case any articles contained in such
 “ accounts shall not be explained and proved to the satisfaction
 “ of such justices, they may disallow the same; and when-
 “ ever the said accounts shall be so settled and allowed, or
 “ disallowed, as aforesaid, all such books and assessments shall
 “ be transmitted to the churchwarden or overseer of the poor
 “ for such parish, township, or place, respectively, or, if the
 “ place be extraparochial, then to some principal inhabitant
 “ thereof, to be kept for the use of such parish, township, or
 “ place; and the said surveyor shall forthwith deliver a du-
 “ plicate of such book and account, together with all sums of
 “ money as shall remain in his hands, and likewise all tools,
 “ materials, implements, and other things, as aforesaid, to
 “ the succeeding surveyor for such parish, township, or place,
 “ in case any new surveyor shall be appointed, or retain the
 “ same in his hands, and account for them in his next ac-
 “ count, if he shall be continued surveyor for such parish,
 “ township, or place, in the succeeding year; and the suc-
 “ ceeding surveyor is hereby required to recover, collect, and
 “ receive, all such sums of money which shall be due and ow-
 “ ing as aforesaid, by all such ways and means, as fully and
 “ effectually, to all intents and purposes, as the preceding sur-
 “ veyor could, might, or ought to have recovered, collected,
 “ or received the same: and in case such surveyor shall ne-
 “ glect to provide such book or books, or to enter such re-
 “ spective accounts and lists therein, or to deliver the said
 “ book or books, and such duplicate thereof, and such assess-
 “ ments, tools, materials, implements, and other things, in
 “ manner aforesaid, he shall, for every such offence, forfeit
 “ not exceeding five pounds, nor less than forty shillings; and
 “ in case he shall make default in the paying or accounting
 “ for the money so remaining in his hands, within the time,
 “ and according to the directions aforesaid, he shall forfeit
 “ double the value of the money which shall be adjudged by
 “ the said justices to be in his hands; and in case any such
 “ surveyor shall die before such respective accounts and lists
 “ shall be made out, or such monies, books, assessments,
 “ tools, materials, and implements, shall be so delivered and
 “ paid, the executors or administrators of such surveyor shall
 “ make out, pay, and deliver the same, in like manner, and
 “ under the like penalty, as such surveyor is hereby required
 “ and made subject and liable to; and every surveyor shall
 “ pay to the justices clerks, for the appointment and charge,
 “ the sum of one shilling; for the bond sixpence; and for the
 “ account so to be examined and taken, and for the oath so
 “ to be administered, the sum of one shilling, and no more;
 “ and if any person or persons shall receive any greater sum
 “ or

for the business aforesaid than herein before mentioned shall forfeit the sum of ten pounds for every offence."

. 45. And it is also enacted, by par. 50. " That a sufficient quantity of stone, gravel, chalk, or materials, cannot be provided and carried by the carts and teams required by this act to perform statute the surveyor shall contract for the getting and carrying thereof, (in the presence of the said assistant, if any such be appointed), at a meeting to be held for that purpose, which ten days notice in writing shall be given, by fixing the same upon the door of the church or chapel of the parish or township, or place, or if there be no church or chapel the most publick place there; which notice shall contain the work to be done, and the time and place for the same; thereof; and if any surveyor shall have any part, or interest, directly or indirectly, in any such contract or in any other contract or bargain for work or materials to be made, done, or provided, upon, for, or on account of any of the highways, roads, bridges, or other works, or ever, under his care or management, or shall, upon any account, directly or indirectly, let to hire any cart or fell or dispose of any timber, stone, or other materials, to be used or employed in making or repairing such bridges, or other works, as aforesaid, (unless a licence in writing, for the sale of any such materials, or to hire any such team, be first obtained from some justice of the peace within that limit), he shall forfeit, for every offence, the sum of ten pounds, and be for ever after incapable of being employed as a surveyor with a salary, by the authority of this act."

How materials may be contracted for.

And it is further enacted, by par. 51. " That if any surveyor of the highways, after his acceptance of the said office, shall neglect his duty in any thing required of him by this act, for which no particular penalty is imposed, he shall, for every such offence, any sum not exceeding five pounds, nor less than ten shillings, at the discretion of the justices or justices having jurisdiction therein."

Penalty upon the surveyor.

also, by par. 54. " That the justices of the peace of every county, corporation, boroughs, and other places, are required to put in execution every part of this act within their respective jurisdictions."

Justices of cities to put the act in execution.

47. And it is recited, by par. 44. of the said statute, that whereas, by several acts of parliament concerning turnpike roads, it is enacted, that where the surveyor receives money due to the turnpike roads, he shall pay it to the treasurer.

Where the surveyor receives money due to the turnpike roads, he shall pay it to the treasurer.

Books, materials, tools, &c. to be delivered to the succeeding surveyor. New surveyor authorized to collect the arrears, &c.

The surveyor liable to forfeitures for neglect of duty.

If surveyor dies, his executors, &c. shall account in the same manner. Fees to be paid to the justices clerks.

“ to by such justice shall have been explained and verified by
 “ proper evidence, to the satisfaction of the justices at such
 “ special sessions; and in case any articles contained in such
 “ accounts shall not be explained and proved to the satisfaction
 “ of such justices, they may disallow the same; and when-
 “ ever the said accounts shall be so settled and allowed, or
 “ disallowed, as aforesaid, all such books and assessments shall
 “ be transmitted to the churchwarden or overseer of the poor
 “ for such parish, township, or place, respectively, or, if the
 “ place be extraparochial, then to some principal inhabitant
 “ thereof, to be kept for the use of such parish, township, or
 “ place; and the said surveyor shall forthwith deliver a du-
 “ plicate of such book and account, together with all sums of
 “ money as shall remain in his hands, and likewise all tools,
 “ materials, implements, and other things, as aforesaid, to
 “ the succeeding surveyor for such parish, township, or place,
 “ in case any new surveyor shall be appointed, or retain the
 “ same in his hands, and account for them in his next ac-
 “ count, if he shall be continued surveyor for such parish,
 “ township, or place, in the succeeding year; and the suc-
 “ ceeding surveyor is hereby required to recover, collect, and
 “ receive, all such sums of money which shall be due and ow-
 “ ing as aforesaid, by all such ways and means, as fully and
 “ effectually, to all intents and purposes, as the preceding sur-
 “ veyor could, might, or ought to have recovered, collected,
 “ or received the same: and in case such surveyor shall ne-
 “ glect to provide such book or books, or to enter such re-
 “ spective accounts and lists therein, or to deliver the said
 “ book or books, and such duplicate thereof, and such assess-
 “ ments, tools, materials, implements, and other things, in
 “ manner aforesaid, he shall, for every such offence, forfeit
 “ not exceeding five pounds, nor less than forty shillings; and
 “ in case he shall make default in the paying or accounting
 “ for the money so remaining in his hands, within the time,
 “ and according to the directions aforesaid, he shall forfeit
 “ double the value of the money which shall be adjudged by
 “ the said justices to be in his hands; and in case any such
 “ surveyor shall die before such respective accounts and lists
 “ shall be made out, or such monies, books, assessments,
 “ tools, materials, and implements, shall be so delivered and
 “ paid, the executors or administrators of such surveyor shall
 “ make out, pay, and deliver the same, in like manner, and
 “ under the like penalty, as such surveyor is hereby required
 “ and made subject and liable to; and every surveyor shall
 “ pay to the justices clerks, for the appointment and charge,
 “ the sum of one shilling; for the bond sixpence; and for the
 “ account so to be examined and taken, and for the oath so
 “ to be administered, the sum of one shilling, and no more;
 “ and if any person or persons shall receive any greater sum
 “ or

“ or fee for the business aforesaid than herein before mentioned, he shall forfeit the sum of ten pounds for every offence.”

† *Sec.* 45. And it is also enacted, by par. 50. “ That where a sufficient quantity of stone, gravel, chalk, or other materials, cannot be provided and carried by the labourers and teams required by this act to perform statute duty, the surveyor shall contract for the getting and carrying thereof, (in the presence of the said assistant, if any such shall be appointed), at a meeting to be held for that purpose, of which ten days notice in writing shall be given, by fixing the same upon the door of the church or chapel of the parish, township, or place, or if there be no church or chapel, at the most publick place there; which notice shall specify the work to be done, and the time and place for letting thereof; and if any surveyor shall have any part, share, or interest, directly or indirectly, in any such contract, or in any other contract or bargain for work or materials to be made, done, or provided, upon, for, or on account of any of the highways, roads, bridges, or other works whatsoever, under his care or management, or shall, upon his own account, directly or indirectly, let to hire any team, or sell or dispose of any timber, stone, or other materials, to be used or employed in making or repairing such roads, bridges, or other works, as aforesaid, (unless a licence, in writing, for the sale of any such materials, or to let to hire any such team, be first obtained from some justice of the peace within that limit), he shall forfeit, for every such offence, the sum of ten pounds, and be for ever after incapable of being employed as a surveyor with a salary, under the authority of this act.”

How materials may be contracted for.

† 46. And it is further enacted, by par. 51. “ That if any surveyor of the highways, after his acceptance of the said office, shall neglect his duty in any thing required of him by this act, for which no particular penalty is imposed, he shall forfeit, for every such offence, any sum not exceeding five pounds, nor less than ten shillings, at the discretion of the justice or justices having jurisdiction therein.”

Penalty upon the surveyor.

† And also, by par. 54. “ That the justices of the peace of all cities, corporations, boroughs, and other places, are hereby required to put in execution every part of this act within their respective jurisdictions.”

Justices of cities to put the act in execution.

† *Sec.* 47. And it is recited, by par. 44. of the said statute, That whereas, by several acts of parliament concerning

Where the surveyor receives money due to the turnpike roads, he shall pay it to the treasurer.

turnpike

(19) Vide the end of this chapter.

How the same shall be applied.

turnpike roads (19), a certain part of the duty called statute duty is or may be directed to, be performed on such roads, and it may happen in some places, that the several persons liable thereto may have compounded for the same. It is therefore further enacted, " That in all such cases, the surveyor of highways, where such composition shall have been made, shall pay to the treasurer or surveyor of such turnpike roads a certain part of the composition money so received, to be proportioned according to the number of days duty which such person or persons was or were liable to perform on such turnpike road; which money shall be laid out and expended on such part of the said turnpike road as lies within the parish, township, or place, from which it was received, and not elsewhere; and if such surveyor of the highways shall refuse or neglect to pay to the treasurer or surveyor of such turnpike road such part of the said composition money so received by him, within twenty days after he shall have received the same, upon demand made by such treasurer or surveyor, the same shall and may be levied on the goods and chattels of such surveyor, in such manner as penalties and forfeitures are by this act authorized to be levied."

As to the sixth general Head of this Chapter, viz. What shall be said to be a nuisance to the highway, I shall consider: What shall be said to be such a nuisance at common law, and what by statute.

Kitch. 34, 35.

Sec. 48. As to the first point, there is no doubt but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act, which will render it less commodious to the king's people, are publick nuisances at common law.

2 R. Abr. 137, 265.

Sec. 49. Also it seemeth to be clear, That it is no excuse for one who layeth such logs in the highway that he laid them only here and there, so that the people might have a passage by windings and turnings through the logs: yet it is said to be no nuisance for the inhabitants of a town to unlade billets, &c. in the street before their houses, by reason of the necessity of the case, unless they suffer them to continue there an unreasonable time, after they are unloaded.

2 R. Abr. 137.

2 H. 7. 5.
Kitch. 34, 35.
2 H. 7. 5.

Sec. 50. There is no doubt but that it is a nuisance at common law to erect a new gate in a highway, as hath been more fully shewn in the precedent chapter. Also it seemeth clear, That it is a like nuisance to suffer the ditches adjoining to a highway to be foul, by reason whereof it is impaired, or to suffer the boughs of trees growing near the highway to hang over

over the road, in such a manner as thereby to incommode the passage.

Sec. 51. As to the second point, *viz.* What shall be said to be a nuisance to the highway by statute; not only all the above mentioned nuisances, which are such at common law, are esteemed also nuisances by statute, but there is also one particular nuisance which is made such by statute, and doth not seem to be taken notice of by common law, and that is the drawing of a travelling carriage with more than six horses in length (*a*), the permitting whereof hath occasioned the carrying of such excessive loads in such carriage, that the weight thereof hath in many places rendered the roads unpassable.

(*a*) For the number now permitted to be drawn, vide *infra*, sect. 65.

As to the seventh general Head of this Chapter, *viz.* How such nuisances are to be removed and punished, I shall consider the following particulars: First, In what order hedges and ditches, adjoining to the highway, ought to be kept. Secondly, How far all trees and bushes are to be removed from the highway. Thirdly, In what manner all other annoyances obstructing the highway are to be removed. Fourthly, How far all persons are punishable for taking away things made use of for the benefit of the highway. Fifthly, How far they may be punished for drawing a carriage with more than five horses in length.

Sec. 52. As to the first particular, *viz.* In what order hedges and ditches, adjoining to the highway, ought to be kept. It is said, That he who hath lands next adjoining to a highway, is bound of common right to scour his ditches; but it is said, that he who hath lands next adjoining to such lands, is not bound by the common law so to do, without some special prescription for that purpose; and perhaps it is the better opinion, That he who hath trees next adjoining to the highway, and hanging over it to the annoyance of the people, is bound by the common law to lop the same: and it seems clear, That any person may justify the lopping such trees, so far as to avoid the nuisance.

8 Hen. 7. 5.
Kitch. 34, 35.
Dalton, c. 26.
174.
Summary, 144

† *Sec. 53.* However it is enacted by 13 Geo. 3. c. 78. par. 7. "That the possessors of the land next adjoining to every highway shall cut, prune, and plash their hedges, and also cut down or prune and lop the trees growing in or near such hedges or other fences, (except those trees planted for ornament or shelter, as hereafter mentioned) (*b*) in such manner that the highways shall not be prejudiced by the shade thereof respectively, and that the sun and wind may not be excluded from such highway to the damage thereof, within ten days after notice given by the surveyor for that purpose, or the surveyor shall make complaint thereof to some justice

Trees adjoining to a highway, whom and in what manner, be cut and pruned.

(*b*) Vide *infra* sect. 59.

“ of the limit, who shall summon the possessor of the said lands to some special sessions, to answer to the said complaint; and if it shall appear to the justices, that such possessor had not complied with the requisites of this act, the said justices, upon hearing the surveyor and the possessor of such land, or his agent, (or in default of his appearance, upon having due proof of the service of such summons), and considering the circumstances of the case, may order such hedges to be cut, plashed, and pruned, and such trees to be cut down, or pruned in such manner, as may best answer the purposes aforesaid; and if the possessor of such lands shall not obey such order within ten days after due notice thereof, he shall forfeit two shillings for every twenty-four feet in length of such hedge which shall be so neglected to be cut and plashed, and two shillings for every tree which shall be so neglected to be cut down or pruned, and lopped.”

On default, the surveyor may prune, &c. at the cost of the defaulter.

† *Sec. 54.* And it is further enacted, “ That the surveyor, in case of such default, shall cut, prune, and plash such hedges, and cut down or prune or lop such trees, in the manner directed by such order; and such possessor shall be charged with, and pay, over and above the said penalties, the charges and expences of doing the same; or, in default thereof, such charges and expences shall be levied, together with the said forfeitures, upon his or her goods and chattels, by warrant from a justice of peace, in such manner as is authorised for forfeitures incurred by virtue of this act.”

Occupiers to make drains and ditches, &c.

† *Sec. 55.* And it is further enacted, par. 8. “ That ditches, drains, or watercourses, of a sufficient depth and breadth, for the keeping all highways dry, and conveying the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, plats, or bridges, shall be made and laid where any cartways, horseways, or footways, lead out of the said highways into the lands or grounds adjoining thereto, by the occupier of such lands or grounds; and every person who shall occupy any lands or grounds adjoining to, or lying near such highway through which the water hath used to pass from the said highway, shall open, cleanse, and scour, the ditches, watercourses, or drains, for such water to pass without obstruction; and that every person making default, after ten days notice by the surveyor, shall forfeit ten shillings.”

Where the old ditches, &c. are not sufficient, new ones are to be made.

† *Sec. 56.* And it is further enacted, by par. 14. “ That where the ditches, gutters, or watercourses, shall not be sufficient to carry off the water which shall lie upon and annoy the highways, the surveyors, by the order of any one
“ of

“ of the said justices, shall make new ditches and drains in and
 “ through the lands and grounds adjoining or lying near to
 “ such highways, or in and through any other lands or
 “ grounds, if it shall be necessary, for the more easy and ef-
 “ fectually carrying off such water from the said highways,
 “ and also to keep such ditches, gutters, or watercourses,
 “ scoured, cleansed, and opened; and the surveyors, and
 “ their workmen, are authorised to go upon the lands, for the
 “ purposes aforesaid.”

† *Seet.* 57. And it is further enacted, “ That the surveyors
 “ shall make proper trunks, tunnels, plats, bridges, or arches,
 “ over such ditches, gutters, or watercourses, for the conve-
 “ nient use and enjoyment of the lands or grounds through
 “ which the same shall be made, and keep the same in repair,
 “ and make satisfaction to the owner or occupier of such
 “ lands which are not waste or common, for the damages
 “ sustained thereby; to be settled and paid in such manner as
 “ the damages for getting materials in several or inclosed
 “ lands or grounds are hereafter directed to be settled and
 “ paid.”

Surveyors to
make trunks,
&c.

Seet. 58. As to the second particular, *viz.* How far all
 trees and bushes are to be removed from the highway, it ap-
 pears from the above mentioned (a) statute of Winchester, Chapter 5. “ That no small tree or bush, whereby a man may
 “ lurk to do hurt, ought to be suffered to stand within two
 “ hundred foot of either side of a highway leading from one
 “ market-town to another.”

(a) Vide supra,
Seet. 26.

† *Seet.* 59. And it is farther enacted, by 13 Geo. 3.
 c. 7. par. 6. “ That no tree, bush, or shrub, shall be per-
 “ mitted to stand or grow in any highways within the di-
 “ stance of fifteen feet from the centre thereof (except
 “ for ornament or shelter to the house, building or court yard
 “ of the owner thereof); or hereafter to be planted within the
 “ distance aforesaid; but the same shall be respectively
 “ cut down, grubbed up, and carried away by the owner or
 “ occupier of the land or soil, where the same doth or shall
 “ stand or grow, within ten days after notice to him, or his
 “ steward or agent, given by the said surveyors, or any of
 “ them, on pain of ten shillings.”

No tree, bush,
or shrub, to
grow within 15
feet of the cen-
tre, &c.

† *Seet.* 60. But it is also provided by the said statute,
 par. 13. “ That no person shall be compelled, nor any sur-
 “ veyor permitted to cut or prune any hedge, than between
 “ the last day of December and the last day of March; and
 “ that nothing in this act contained shall oblige any person to
 “ fell any timber trees, in hedges, at any time whatsoever,
 “ except

Times of cut-
ting hedges, and
felling trees, &c.

“ except where the highways shall be ordered to be enlarged,
 “ or to cut down or grub up any oak trees growing within
 “ such highway, or in such hedges, except in the months of
 “ April, May, or June, or any ash, elm, or other trees, in
 “ any other months than in the months of December, Ja-
 “ nuary, February, or March.

1 Jones 212.

Vide 4 Affize 3.
 17 Ed. 3. 9. b.
 2 Rol. Abr.
 137. B. 4.
 142, K. L.

Sec. 61. As to the third particular, *viz.* In what manner all other annoyances obstructing the highway are to be removed; it seems clear, That by the common law any one may abate a nuisance to a highway, and to remove the materials, but not convert them to his own use, as hath more fully been shewn in the precedent Chapter. Also it seemeth, That an heir may be indicted for continuing an incroachment, or other nuisance to a highway, begun by his ancestor, because such a continuance thereof amounts in the judgment of law to a new nuisance.

Penalty for nu-
 sances obstruct-
 ing highways.

† *Sec. 62.* But the common law, not having been thought to have provided sufficiently against mischiefs of that kind, it is enacted by the above mentioned statute of 13 Geo. 3. c. 78. par. 9. “ That if any person shall lay, in any highway, any
 “ stone, timber, straw, dung, or other matter, or in making,
 “ scouring, or cleansing, the ditches or watercourses, shall
 “ permit the soil or earth dug out of such ditches, drains, or
 “ watercourses, to remain in such highway, in such manner
 “ as to obstruct or prejudice the same, for the space of five
 “ days after notice thereof by the surveyor, he shall forfeit
 “ ten shillings.”

If not removed
 after notice, how
 to be disposed of.

† And it is further enacted, par. 10. “ That if any stone
 “ or timber, or any hay, straw, stubble, or other matter,
 “ for the making of manure, or on any other pretence what-
 “ soever, not tolerated by this act, shall be laid in any high-
 “ way, within the distance of fifteen feet from the centre
 “ thereof, and shall not, within five days after notice by the
 “ surveyor, or some person aggrieved thereby, be removed,
 “ the owner or possessor of the lands adjacent, or any other
 “ person whomsoever, by order from some justice, may re-
 “ move the said stone, timber, hay, straw, dung, or other
 “ matter, and have, take, and dispose of the same, to his
 “ and their own use.”

Obstructions to
 highways by
 carriages, &c.

† And by par. 11. for preventing obstructions in the said highways, “ That if any person shall wilfully set, place, or
 “ leave, any waggon, cart, or other carriage, or any plough
 “ or instrument of husbandry, in any of the said highways,
 “ (except during the reasonable time of loading or unloading,
 “ and standing as near the side of such highway as possible) so as to
 “ in-

“ interrupt or hinder the free passage of any other carriage,
 “ or of his majesty’s subjects, every person so offending shall
 “ forfeit ten shillings.”

† *Sec.* 63. And it is further recited by the above-mentioned statute of 13 Geo. 3. c. 78. par. 64. “ That whereas inconveniences have arisen from making hedges or other fences, and from ploughing or breaking up the soil of lands or grounds near the middle or centre of highways: for remedy thereof,” it is therefore enacted, “ That if any person shall
 “ incroach, by making any hedge, ditch, or other fence, on
 “ any highway, not being turnpike road, within the distance
 “ of fifteen feet from the middle or centre thereof, or shall
 “ plough, harrow, or break up the soil of any land or
 “ ground, or in ploughing or harrowing the adjacent lands
 “ shall turn his plough in or upon any land or ground
 “ within the distance of fifteen feet from the middle or centre
 “ of any highway, where the breadth of such highway is
 “ formed and marked, or described with certainty, and does
 “ not exceed in breadth thirty feet, he shall forfeit forty
 “ shillings to such person who shall make information of
 “ the same; and the surveyor may cause such hedge, ditch,
 “ or fence to be taken down, or filled up, at the expence of
 “ the person to whom the same shall belong: and any justice
 “ of the limit, upon proof to him upon oath, may levy as
 “ well the expences of taking down such hedges, as the
 “ several penalties hereby imposed, by distress and sale of the
 “ offender’s goods and chattels.”

Penalty of incroaching upon highways.

Incroachment to be taken down by surveyor.

† And by par. 63. of the said statute for preventing obstructions, which frequently happen by stopping of carriages on or near publick bridges, it is further enacted, “ That if any
 “ person collecting any tolls payable for passing over any
 “ publick bridge with carriages or cattle of any kind shall
 “ keep any victualling-house, alehouse, or other place of
 “ publick entertainment, or shall sell, or permit to be sold
 “ therein, any wine, beer, ale, cyder, spirituous liquors, or
 “ other strong liquors, by retail, he, being convicted by one
 “ witness, or his own confession, before any justice of the
 “ limit, shall forfeit five pounds.”

Alehouses not suffered on bridges where tolls are kept.

† *Sec.* 64. As to the fourth particular, viz. How far all persons are punishable for taking away things made use of for the benefit of highways, it is recited by the above-mentioned statute of 13 Geo. 3. c. 78. par. 53. “ That whereas in some places it hath been and may be found necessary to secure horse caufeways and foot caufeways, by posts, blocks, or great stones, fixed in the ground, or by banks of earth cast up, or otherwise, from being broken up and spoiled with waggons, wains, carts, or carriages; and as several evil-disposed persons do or may wilfully or wantonly pull
 up,

Penalty for damaging banks, caufeways, posts, blocks, &c. &c.

up, cut down, and remove or damage the said posts, blocks, and great stones, so fixed, or to be fixed, as aforesaid, and drive carriages upon such banks and causeways, or against the sides thereof, and also dig or cast down the said banks, which are the securities and defence of the said causeways, whereby the causeways or banks are often ruined and destroyed; and such evil-disposed persons do or may break, damage, or throw down the stones, bricks, or wood, fixed upon the parapets or battlements of bridges, and do or may pull down, destroy, obliterate, or deface, any mile stone or post, graduated or direction post or stone, erected or to be erected upon any highway." It is enacted, "That every person guilty of any such offence, shall, upon complaint to any justice where the same shall be proved to be done, by the oath of one witness, or upon view of the justice himself, forfeit not exceeding five pounds, nor less than ten shillings; and in default of payment, shall be committed to the house of correction of such limit, to be whipped, and kept to hard labour not exceeding one calendar month, nor less than seven days. (20)

(20) The same provisions are made in respect to turnpike roads by 13 Geo. 3. c. 84.

See. 65. As to the fifth particular, *viz.* How far persons may be punished for drawing a carriage with more than five horses in length, it is enacted, by 13 Geo. 3. c. 78. par. 56.

Limitations of the number of horses for carriages with different wheels.

The 6 Anne c. 29.
9 Anne c. 18.
1 Geo. 1. c. 11.
5 Geo. 1. c. 12.
Recited in the former edition repealed by the 7 Geo. 3. c. 42.

4 Burr. 2258.
Stevens v. Duffley.

"That no waggon, having the sole or bottom of the fellies of the wheels of the breadth of nine inches, shall go or be drawn with more than eight horses; and that no cart, having the sole or bottom of the fellies of the breadth of nine inches, shall be drawn with more than five horses; and that no waggon, having the sole or bottom of the fellies of the breadth of six inches, and rolling on each side a surface of nine inches, shall go or be drawn with more than seven horses; and that no such waggon rolling a surface of six inches only, shall go or be drawn with more than six horses; and that no cart, having the sole or bottom of the fellies of the wheels of the breadth of six inches, shall go or be drawn with more than four horses; and that no waggon having the sole or bottom of the fellies of less breadth than six inches, shall go or be drawn with more than five horses; and that no cart having the sole or bottom of the fellies of less breadth than six inches, shall go or be drawn with more than three horses upon highways, not being turnpike roads, under pain, that the owner of such waggon or cart respectively shall forfeit five pounds, and the driver not being the owner, ten shillings, for every horse or beast which shall be so drawing above the number hereby so respectively limited, to the sole use and benefit of the informer:—But carriages moving upon wheels

"or

“ or rollers, of the breadth of sixteen inches on each side thereof, with flat surfaces, are hereby allowed to be drawn with any number of horses, or other cattle.” (a)

(a) Vide appendix at the end of this ch. how these carriages are favoured in the payment of tolls. Prosecutions for such additional horses how to be carried on.

† But it is provided, by par. 57. of the said statute, “ That no prosecution shall be commenced before a justice by information, for any forfeiture incurred by the owner or driver of any carriage, having a greater number of horses therein than are allowed by this act, unless within three days after the offence committed; and that no action shall be commenced for any such offence, unless within one calendar month; and that neither such information or action, unless notice shall be given by the informer to the driver of every such carriage, on the day upon which the offence shall be committed, of an intention to complain of such offence; and if it shall appear to the justice, that the offender lives so remote as to make it inconvenient to summon him to appear, the justice may leave the informer to his remedy by action at law.”

† And it is further provided, by par. 58. “ That the general quarter sessions, to be held in the week after *Michaelmas*, may license an increase of horses in carriages up any steep hill, or on any road not turnpike, over and above the number herein-before limited, if, upon inquiry into the state and condition of such roads, they shall find any additional number of horses necessary; and, from time to time, at any *Michaelmas* quarter sessions, to revoke, alter, or vary the same, as they shall think fit.”

Justices at sessions may licence an additional number of horses.

† And it is further provided, by par. 59. “ That if it shall appear upon the oaths of credible witnesses, to the satisfaction of any justice, or of court of justice authorized to enforce the execution of this act, that any carriage could not, by reason of deep snow or ice, be drawn by the number of horses or beasts allowed; such justice, or court respectively, are hereby required to stop all proceedings for the recovery of any penalty incurred by drawing with a greater number than are hereby allowed; provided that the regulations concerning the number of horses, and wheels of carriages, employed only in carrying any one stone, block of marble, cable rope, or piece of metal, or piece of timber, or to such ammunition or artillery as shall be for his majesty's service; and that two oxen or horned cattle shall, for all the purposes of this act, be considered as one horse.”

Justices may stop proceedings for forfeiture in respect of additional horses.

Vide Stevens and Duffy, 4 Burr. 2260.

Carriages excepted out of this act.

Two oxen equal to one horse.

† And by par. 60. for the better discovery of offenders, it is enacted, “ That the owner of every waggon; wain, cart, coach, all carriages,

The owner's name, &c. to be painted on

“ coach, post-chaise, or other carriage let to hire, shall cause
 “ to be painted, upon some conspicuous part of his waggon,
 “ wain, or cart, and upon the pannels of the doors of all
 “ such coaches, post chaises, or other carriages, before the
 “ same shall be used upon any publick highway, his christian
 “ and surname, and the place of his abode, in large legible
 “ letters, and continue the same thereupon so long as such
 “ waggon, cart, coach, post-chaise, or other carriage, shall
 “ be used upon any such highway; and the owner of every
 “ common stage waggon or cart, employed in travelling stages
 “ from town to town, shall, over and above his or her christian
 “ and surname, paint, or cause to be painted, on the part,
 “ and in the manner aforesaid, the following words, “ COM-
 “ MON STAGE WAGGON or CART, as the case may be,
 “ upon pain of forfeiting a sum not exceeding five pounds,
 “ nor less than twenty shillings.”

Drivers of carriages punishable for misbehaviour or negligence, in order to prevent accidents.

Stat. 66. And it is further recited by the said statute of 13 Geo. 3. c. 78. par. 61. “ That whereas many bad accidents happen, and great mischiefs are frequently done upon the streets and highways, by the negligence or wilful misbehaviour of persons driving carriages thereon;” it is therefore further enacted, That if the driver of any cart, “ car, dray, or waggon, shall ride upon any such carriage
 “ in any street or highway, not having some other person
 “ on foot, or on horseback, to guide the same, (such carriages as are conducted by some person holding the reins of the horse or horses drawing the same excepted); or if
 “ the driver of any carriage whatsoever on any part of any
 “ street or highway shall, by negligence, or wilful misbehaviour, cause any hurt or damage to any person or carriage
 “ passing or being upon such street or highway, or shall quit
 “ the highway, and go on the other side the hedge or fence
 “ inclosing the same; or wilfully be at such distance from
 “ such carriage, whilst it shall be passing upon such highway, that he cannot have the direction and government of
 “ the horses or cattle drawing the same; or shall, by negligence or wilful misbehaviour, prevent, hinder, or interrupt
 “ the free passage of any other carriage, or of his majesty’s subjects, on the said highways; or if the driver of any empty
 “ or unloaded waggon, cart, or other carriage, shall refuse or neglect to turn aside and make way for any coach, chariot, chaise, loaded waggon, cart, or other loaded carriage; or
 “ if any person shall drive, or act as the driver, of any such
 “ coach, post-chaise, or other carriage let for hire, or wagon, wain, or cart, not having the owner’s name as before
 “ required, painted thereon, or shall refuse to discover the
 “ true christian and surname of the owner of such respective
 “ carriages; being convicted by his own confession, the view of

“ 4

“ a justice, or the oath of one witness, before any justice of the limit, shall forfeit not exceeding ten shillings, in case such driver shall not be the owner of such carriage; and in case the offender be owner, then not exceeding twenty shillings: and in either case, shall, in default of payment, be committed to the house of correction, not exceeding one month, unless the same shall be sooner paid; and every such driver may, with or without any warrant, be apprehended by any person who shall see such offence committed, and shall be immediately conveyed to a peace officer, in order to be conveyed before some justice; and if any such driver shall refuse to discover his name, the justice before whom he shall be taken, or to whom any such complaint shall be made, may commit him to the house of correction not exceeding three months, or proceed against him for the penalty aforesaid, by a description of his person and the offence, and expressing in such proceedings that he refused to discover his name.”

† *Sec.* 67. As to the eighth general Head of this Chapter, viz. In what manner those, who are charged with any offence relating to the highway, are to be proceeded against: It is enacted by the above-mentioned statute of 13 Geo. 3. c. 78. par. 70. “ That the forms of proceedings in the schedule shall be used, upon all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and that no objection shall be made, or advantage taken, for want of form in any such proceedings.”

The forms of proceeding.

† *Sec.* 68. And it is further enacted, by par. 71. “ That the justices shall, at every special sessions to be held in the week next after the *Michaelmas* general quarter sessions, shall procure and deliver a printed abstract of the most material parts of this act to every surveyor to be then appointed, as the charge hereby directed to be given; who shall severally pay sixpence for the same.”

Printed abstracts to be given to the surveyors.

† *Sec.* 69. And it is further enacted by the same statute, par. 73. “ That all penalties and forfeitures, and all costs and charges, (the manner of levying and recovering of which is not hereby otherwise particularly directed), shall be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of some justice for the limit where such offence shall happen, or such order for payment of such costs or charges shall be made, rendering the overplus to the party after deducting the charges of making the same; which warrant such justice is hereby empowered to grant, upon conviction by

“ confession,

Forfeitures, costs and charges may be levied by distress, &c.

In what manner
to be applied.

“ confession, or the oath of one witness, or upon order made
“ as aforesaid; and when so levied, shall be paid, the one
“ half to the informer, and the other half to the surveyor
“ where such offence shall happen; to be applied towards
“ the repairs, unless otherwise directed by this act; but in
“ case the surveyor shall be the informer, then the whole
“ shall be employed towards the repair of such highway:—
“ And in case such distress cannot be found, and such penal-
“ ties or costs and charges, shall not be forthwith paid, such
“ justice is hereby authorized, by warrant under his hand or
“ seal, to commit such offender to the common gaol or
“ house of correction of the limit where the offence shall be
“ committed, or such order as aforesaid shall be made, for
“ any time not exceeding three months, unless the said pe-
“ nalty, costs, and charges, shall be sooner paid; and if such
“ offender shall live out of the jurisdiction of the justice, any
“ justice of the limit wherein such person shall inhabit, upon
“ request to him for that purpose made, and upon a true
“ copy of the conviction, and order for the payment of
“ such costs and charges, produced and proved by a credi-
“ ble witness upon oath, may, by warrant under his hand and
“ seal, cause the penalty mentioned in such conviction, and
“ the costs and charges mentioned in such order, or so much
“ thereof as shall not have been paid, to be levied, by distress
“ and sale of the goods and chattels of such offender; and if
“ no sufficient distress can be had, commit such offender
“ to the common gaol, or house of correction of such limit,
“ for the time, and in manner aforesaid.”

How to proceed
when the offen-
der lives within
another jurisdic-
tion.

Warrant of dis-
tress when to be
issued.

† Provided by par. 74. “ That no warrant of distress, unless
“ otherwise directed by this act, shall be issued for levying
“ any penalty, costs or charges, until six days after the of-
“ fender shall have been convicted, and an order made and
“ served upon him or her for payment thereof.”

Convictions how
to be made.
Strange 182.
20 Modern 150.

† *Sec.* 70. And it is further enacted, par. 77. “ That
“ no conviction shall be made unless upon confession, or the
“ oath of one witness, or the view of a justice in the cases
“ before-mentioned; and that any inhabitant shall be deemed
“ a competent witness.”

(21) Vide Ke-
lynge 34.
Str. 900, 944.
B. R. H. 99.
Sess. Caf. 179,
415.
Strange 1209.
Barn. K.B. 111,
445.
1 Black. 467.

† *Sec.* 71. And it is farther enacted by the said statute,
13 Geo. 3. c. 78. s. 24. “ That every justice of assize,
“ justices of the counties palatine of Chester, Lancaster, and
“ Durham, and of the great sessions in Wales, shall have
“ authority by this statute, upon his or their own view; and
“ every justice of the peace, either upon his own view, (21)
“ or upon information upon oath to him given by any surveyor
“ of the highways, to make presentment, at their respective
“ assizes or great sessions, or in the open general quarter ses-
“ sions,

“ fions, of such respective limit, of any highway, causeway,
 “ or bridge, not well and sufficiently repaired and amended, or
 “ of any other default or offence committed and done contrary
 “ to the provision and intent of this statute; and that all de-
 “ fects in the repair thereof shall be presented in such jurisdic-
 “ tion where the same do lie, and not elsewhere; and that
 “ no such presentment, nor any indictment for any such de-
 “ fault or offence, shall be removed by *certiorari*, or other-
 “ wise, out of such jurisdiction, till such indictment or pre-
 “ sentment be traversed, and judgment thereupon given, (22)
 “ except where the duty or obligation of repairing the said
 “ highways, causeways, or bridges, may come in question;
 “ and that every such presentment made by any such justice of
 “ assize, counties palatine, great sessions, or of the peace,
 “ upon his own view, or upon such information having been
 “ given to such justice of the peace, upon the oath of such
 “ surveyor of the highways, as aforesaid, shall be as good,
 “ and of the same force, strength, and effect, in the law, as
 “ if the same had been presented and found by the oaths of
 “ twelve men; and that for every such default or offence so
 “ presented, as aforesaid, the justices of assize, counties pa-
 “ latine, and great sessions, at their respective courts, and
 “ the justices of the peace, at their general quarter sessions,
 “ shall have authority to assess such fines as to them shall be
 “ thought meet: saving to every person and persons that shall
 “ be affected by any such presentment, his, her, or their lawful
 “ traverse to the same presentment (23), as well with respect
 “ to the fact of non-repair as to the duty or obligation of re-
 “ pairing the said highways, as they might have had upon
 “ any indictment of the same, presented and found by a grand
 “ jury; and the justices of the peace, at their general quar-
 “ ter sessions, or the major part of them, may, if they see
 “ just cause, direct the prosecutions upon such presentments
 “ as shall be made at the quarter sessions, as aforesaid, to be
 “ carried on at the general expence of such limit, and to be
 “ paid out of the general rates within the same.

Justices of assize
 and of the peace,
 &c. to present
 highways, &c.
 out of repairs

(23) It is now
 settled that the
 justices are com-
 pellable by man-
 damus to re-
 ceive a general
 traverse to a
 presentment of a
 highway being
 out of repair,
 made by a jus-
 tice of peace
 upon view.
 Burr. 1532.
 4 Modern 38.
 Show. 270.
 1 Black. 468.

(22) This clause is copied from a similar clause in 22 Car. 2. c. 12. s. 4. and upon the authority of the King v. Farewell. 2 Strange 1209, which was an application for a *certiorari* to remove an indictment upon that highway act, it was resolved Trin. 14 Geo. 3. that a *certiorari pro rege* lies upon 23 Geo. 3. c. 78. s. 24. before traverse of the indictment and judgment thereupon: for the King does not traverse, and therefore the words “till such indictment be traversed,” shew very plainly that this clause was not intended to take away the writ of *certiorari* at the instance of the Crown—and although a private person is the real prosecutor, yet in these cases that circumstance makes no distinction; for it was calculated merely to prevent delay on the part of defendants. Rex v. Inhabitants of Bodenham. Cowper 78.

SECT. 72. It hath been holden in the exposition of this clause, That the party against whom such a presentment shall be made, cannot take any traverse to the want of repair of such highway; but it is agreed, That he may plead that some other

Kellw. 240.
 Crom. 131.
 Dalt. c. 26.
 1 Black. 467.

other person ought to repair the same, and traverse his own obligation to do it. Neither can I see upon what reason the former opinion is grounded, that he cannot traverse the want of repair of such highway; for since the statute expressly saves to every person who shall be touched by any such presentment, his lawful traverse to the same, as he might have to an indictment of trespass or forcible entry;" and since it seems clear, That every defendant to any such indictment may traverse the whole matter alledged against him, as hath been shewn more at large, Chap. 64. Sect. 58. why may he not as well have the same benefit in the present case? And though the record of a justice of peace acting by force of any statute, as a judge, be not traversable; yet it seems hard by such a general rule, to make any record not traversable, which by the express words of the statute, which authorises the making of it, is allowed to be traversable: it is true indeed, That a presentment in a court-leet is not traversable, unless it touch the party's freehold: but I do not see why such a presentment in pursuance of this statute should have the like privilege since the statute hath no mention of such presentments in courts-leet, but gives the like traverse as is allowed by law upon any indictment of trespass, &c.

See Carth. 212,
213.
Sup. c. 64. s. 18.

5 Hen. 7.
Dyer. 13.

Assessments may
be levied by dis-
tress.

† Sect. 73. And it is also enacted, 13 Geo. 3. c. 78. by par. 68. " That if any person shall refuse or neglect to pay any assessment within ten days after demand thereof made, the same shall be levied by any person authorised by warrant under the hand and seal of one justice, having jurisdiction therein, by distress and sale of the goods and chattels of the person so refusing or neglecting, rendering the overplus, the necessary charges of making such distress and sale being first deducted; and in default of such distress, any such justice may commit the person to the common gaol, until he shall have paid the sum so assessed, and the costs and charges occasioned by such neglect or refusal.

† And by par. 69. " That the surveyor shall be deemed, in all cases, a competent witness, notwithstanding his salary may arise in part from the forfeitures and penalties hereby inflicted."

How the pro-
secutor may pro-
ceed, for a for-
feiture above
40 s.

† Sect. 74. And it is also enacted by par. 75. " That every prosecutor or informer may, at his election, sue for, and recover any penalty of forty shillings or upwards, (the manner of recovery thereof not being particularly directed by this act), either in the manner herein-before directed, or by action at law, in any of his Majesty's courts of record, by action of debt, in which it shall be sufficient to declare that the defendant is indebted, as described in the
" act

“act, and the plaintiff, if he recovers, shall have double costs.”

† *Secl. 75.* Provided, par. 76. “That there shall not be more than one recovery for the same offence; and that ten days notice in writing be given to the party offending previous to the commencement of such action; and that the same be brought and commenced within one calendar month after the offence for which such action is brought, shall have been committed.”

Limitation of actions and notice.

† *Secl. 76.* And it is further enacted, par. 79. “That where any distress is levied, the distress itself shall not be deemed unlawful, nor the party making the same a trespasser, on account of any default or want of form in any proceedings relating thereto, nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by the party distraining, but the person aggrieved by such irregularity, may recover full satisfaction for the special damage in an action on the case.”

Special damage but distress not unlawful for want of form.

† *Secl. 77.* And it is further enacted, par. 83. “That the court before whom any indictment or presentment (24) shall be tried, may award costs to the prosecutor, to be paid by the person so indicted or presented, if it shall appear that the defence was frivolous, or to award costs to the person indicted or presented, to be paid by the prosecutor, if it shall appear that such prosecution was vexatious.”

(24) A person indicted for not repairing roads *ratione tenuræ*, shall on submitting, pay costs to the prosecutor. *Rex v. Wingfield*, 6 Geo. 3: 1 Black. 608.

† And it is further enacted, par. 86. “That if the inhabitants shall agree, at a vestry or publick meeting, to prosecute any person by indictment, or to defend any indictment or presentment preferred against any parish, township, or place, the surveyor may charge in his account the reasonable expences incurred in carrying on or defending such respective prosecutions, after the same shall have been agreed to by such inhabitants at a vestry or publick meeting, or allowed by a justice within the limit where such highway shall be; which expences shall be paid out of the fines, forfeitures, compositions, payments, and assessments.”

† And it is further enacted, par. 87. “That in all cases where a vestry or publick meeting of the inhabitants is directed by this act, there shall be publick notice given of the day, hour, and place, of holding the said meeting, at the church or chapel of such parish, township, or place, on the Sunday next preceding such meeting, and also notice thereof in writing, specifying the purpose of such meeting, fixed at the same time upon the door of such church

“ or chapel, and the same shall not be held till three days
 “ at least after such notice given; and if there be no church
 “ or chapel, the like notice of such meeting shall be given
 “ in writing, and put up at the most publick place therein
 “ three days at least before such meeting.”

Forfeiture for
 opposing the
 execution of the
 act.

(25) Vide 2
 Black. 603.

† And it is further enacted, par. 72. “ That in case any
 “ person shall resist or make forcible opposition against any
 “ employed in the due execution of this act, or make any
 “ rescue of the cattle or other goods distrained; or if any
 “ constable, headborough, or tithingman, shall refuse or neg-
 “ lect to execute or obey any warrant or precept granted by
 “ any justice, pursuant to the directions of this act; being
 “ convicted by a justice, shall forfeit not exceeding ten
 “ pounds, nor less than forty shillings; to be paid to the
 “ surveyor (25) where the offence was committed, to be laid
 “ out in the repair of the highways: and in case he do not
 “ forthwith pay, or secure to be paid, the said forfeiture after
 “ such conviction, such justice may commit such person to
 “ the common gaol or house of correction of the limit, to
 “ remain not exceeding three months, unless the said for-
 “ feiture shall be sooner paid.”

2 Strange 1209.
 2 Strange 944.
 See B. 2. C. 27.
 S. 37, 46, 47.
 Cowper 78.

§ 78. It is enacted by the said statute of 13 Geo. 3.
 c. 78. s. 24. “ That all defects of repairs of causeys, pave-
 “ ments, highways or bridges, shall be presented in the county
 “ only where such causeys, &c. lie, and not elsewhere; and
 “ that no such presentment, or indictment shall be removed
 “ by *certiorari*, or otherwise, out of the said county, till such
 “ indictment or presentment be traversed, and judgment there-
 “ upon given.”

§ 79. And it is farther enacted by the said statute,
 section 81. “ That all matters concerning highways, causeys,
 “ pavements, and bridges, mentioned in the said act, shall be
 “ determined in the county where the same do lie, and not
 “ elsewhere; and that no presentment, judgment, or order,
 “ made by virtue of the said act, shall be removed by *certiorari*
 “ out of the said county into any other court.”

Queen v. Bramby
 Mic. 10 Ann.
 Strange 849,
 900, 944, 1209.
 Bar. K. B.
 111, 236, 445.
 Cal. Temp.
 King &c. 99.
 Sess. Cases
 163, 329,

§ 80. Yet it hath been resolved, That if the quarter
 sessions, under pretence of the jurisdiction given them by
 these statutes, take upon them to do a thing manifestly ex-
 ceeding their authority, as to make an order on surveyors of
 the highways, to make up their accounts before a special ses-
 sions, their proceedings may be removed by *certiorari* into
 the King's Bench, and there quashed; for the quarter-sessions
 have no manner of power given them to intermeddle origi-
 nally with such accounts, but only by way of appeal. (26)

(26) And if the prosecutor has enlarged the rule for shewing cause why the order should not be
 quashed, he cannot afterwards object to the issuing of the *certiorari*. 2 Burr. 745.

§ 81.

† *Sec.* 81. And it is further enacted, par 78. "That any justice may administer an oath to any person for the better discovery and execution of the several matters or things herein-before authorized or directed to be examined, enquired into, or performed by such justice." Oaths.

† And it is further enacted, par. 62. "That any two justices are hereby impowered, to hold any special sessions, besides that which is herein-before directed, for executing the purposes of this act; and to adjourn the same from time to time, as they shall think fit, causing notice to be given of the time and place of holding such special sessions, and of the adjournments thereof, to the several justices acting and residing within such limits, by the high constable, or other proper officer within the same." Justices may hold special sessions on notice.

† *Sec.* 82. As to the ninth general head of this chapter, viz. In what manner persons proceeded against for any of the above mentioned offences may defend themselves; it is enacted by the said statute, 13 Geo. 3. c. 78. par. 81. "That any person aggrieved by any person, in the execution of this act, and for which no particular method of relief hath been appointed, may appeal to the general quarter sessions, such appellant giving notice in writing of such appeal, and of the matter thereof, to the person against whom such complaint shall be made, within six days after the cause of such complaint arose, and within four days after such notice, entering into recognizance before some justice within such limit, with one surety, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the quarter session; and every person having received notice of such appeal, shall return all proceedings before them to the general quarter sessions, on pain of five pounds; and the said session, upon due proof of such notice and recognizance, shall hear and finally determine such appeal in a summary way, and award costs to the parties appealing or appealed against, to be levied as before directed; and the determination of such quarter session shall be final and conclusive, and no proceedings shall be quashed or vacated for want of form, or removed by *certiorari*, or any other writ or process whatsoever, (except as herein-before mentioned), into any court of record at *Westminster*, provided that no such appeal shall be made against any conviction for any penalty, unless the person convicted shall, at the time of such conviction, if present, if not, within six days after, give notice of his intention to appeal, and at the same time enter into recognizance with sufficient sureties to pay such penalty, in case such conviction shall be affirmed; and upon his giving such security, the

Appeal may be made to the quarter sessions.

Proceedings not to be quashed for want of form, nor to be removed by *certiorari*.

“ further proceeding for such penalty shall be suspended until
 “ such appeal shall be heard and determined.”

Limitation of actions, and mode of pleading. † And it is further enacted, by par. 82. “ That every action or suit shall be commenced or prosecuted within three calendar months after the fact committed, and not afterwards ; and shall be brought within the county where the fact was committed, and the defendant may plead the general issue, and give this act, and the special matter, in evidence. And if brought after the time limited, or be laid in any other place than as aforementioned, the jury shall find for the defendant ; or if the plaintiff shall become nonsuit, or discontinue after the defendant shall have appeared, or if, upon demurrer, judgment shall be given against the plaintiff, the defendant shall recover treble costs.”

General issue.

Treble costs.

Plaintiffs not to recover if tender of amends is made. † But it is also provided by par. 80. “ That no plaintiff shall recover for any irregularity, trespass, or wrongful proceedings, if tender of sufficient amends shall be made before such action brought ; and in case no such tender shall have been made, the defendant by leave of the court at any time before issue joined, may pay into court such sum of money as he shall see fit. But nothing in this act contained shall extend to the city of *Bristol*, or to the parish of *Whitechapel*, and *Saint John, Wapping*, nor to abridge the powers of the commissioners of sewers, &c.”

N. B. (27) This observation was applied to the former statutes upon this subject. *Secl.* 83. Also it seems to be implied in the construction of these (27) as well as of all other penal statutes, That no one ought to be convicted of any offence against them, without having notice of the accusation made against him, and an opportunity of defending himself. And therefore I shall take it for granted, that generally no one ought to be punished for any of the above mentioned offences, without being called upon to answer for himself, and having liberty to traverse the matters alledged against him ; it is true indeed, That it is generally holden, That no traverse can be taken against a presentment by a justice of peace of his own knowledge, as to the want of repair ; yet this opinion seems justly questionable for the reasons alledged in the seventy-second section of this chapter.

Secl. 84. However it is certain, That in all other cases, whoever is indicted or presented in any court, except a court-leet, for any offence relating to the highways, may traverse the whole matter alledged against him in such indictment or presentment. But it seemeth to be agreed, That he, who is presented for such an offence in a court-leet, can only traverse it so far as it concerns his freehold, as by charging him with

with being bound to such repairs in respect of the tenure of his lands, &c. for which purpose it is certain that he may remove it by a *certiorari* into the King's Bench, and there traverse it. Also there is no doubt, but that after conviction, or upon a demurrer or confession, any one may take exceptions to any such indictment or presentment in any court for the want of legal form; but the court in discretion will very rarely suffer a man to take such exceptions before such conviction or confession, without a certificate and affidavit that the ways are in good repair.

5 H. 7. 4.
Dyer 14.
Finch 386.

Anderson 234.
1 Keble 256,
291, 329.
2 Keble 715,
728.

Sec. 85. Therefore, for the better understanding in what cases it may be safe to demur to, or confess an indictment or presentment of this kind, I shall lay down the following rules concerning them.

Sec. 86. First, That it is (a) safest in every such indictment to shew both the place from which, and also the place to which the way supposed to be out of repair doth lead, yet exceptions for want of such certainty have sometimes been disallowed; however it seems certain, that there is no necessity to shew (c) that a highway leads to a market town, because every highway leads from town to town.

(a) 2 R. Abr. 81.
Palmer 420.
(b) 2 Keble 715,
728.
3 Keble 89,
644.
Vide 4 Burr.
2091.
Lucas 383.
where an objection of this kind

is disallowed. 1 Brownl. 9. (c) Palmer 389. 2 Roll. 412. BRH. 316.

Sec. 87. Secondly, That it is necessary (d) in every such indictment expressly to shew in what place the nuisance complained of was done, for which (e) cause an indictment for stopping a way at D. leading from D. to C. is not good; for it is impossible that a way leading from D. should be in D. and no other place is alledged. (28)

(d) 3 Keble 644.
(e) 2 R. Abr. 81.
Cowp. 111.

(28) So also in a presentment, the highway must be alledged to lie in the parish, otherwise the parish is not bound to repair. Cowp. 111. Str. 181. But, in an indictment for a nuisance, it is not necessary to mention the *termini* of a highway. Str. 44. Also if there be two vills in a parish, it is not necessary in an indictment for a nuisance to shew in which vill the nuisance lies. Sayer 119.

Sec. 88. Thirdly, That every such indictment ought also certainly to shew what part of the highway the nuisance did extend, as by shewing how many foot in length, and how many foot in breadth it contained, or otherwise the defendant will neither know of the certainty of the charge, against which he is to make his defence, neither will the court be able from the record to judge of the greatness of the offence, in order to assess a fine answerable thereunto; and upon this ground it hath been adjudged, That an indictment for stopping a certain part of the king's way at K. is naught, for the uncertainty thereof. Also it hath been resolved, that the place wherein such a nuisance is alledged, is not sufficiently ascertained in such an indictment.

C. Jac. 324.
Latch 183.

2 R. Abr. 10
81.

2 R. Abr. 81. indictment, by shewing that it contained so many foot in length, and so many in breadth, by estimation. (29)

(29) An indictment for a nuisance in laying soil in a highway is not bad for want of the length and breadth of the nuisance being set out. *Per* Lee C. J. Trin. 27. Geo. 2. Sayer 98. Nor for a nuisance in digging two grips or ditches in a common footway. Sayer 167. Nor for a nuisance that a certain highway and bridge are in a ruinous condition. Sayer 301.

Salkeld 359.
6 Modern 255.
Contra Sayer
163, 169.
(a) C. Eliz. 63.
(b) See 2 R. A.
83.
1 Ventris 208.
Popham 206.
2 Keble 728.
(c) 1 Vent. 208.
3 Keble 28.

Sett. 89. Fourthly, That every such indictment must shew, That the way wherein a nuisance is alledged, is a way common to all the king's people; for which cause it hath been resolved, That an indictment for a nuisance to (a) horseway, without adding that it is a highway, is naught: and upon the same ground it seemeth also, That an indictment for a nuisance to a common footway to the church of *D.* for (b) all the parishioners of *D.* is not good; yet it (c) seems, That if those last words, *viz.* "For all parishioners of *D.*" had been omitted, such an indictment might be maintained.

(d) Noy 93.
3 Keble 855.
The contrary
adjudged Pasch.
5 Geo. 1. the
King v. Cor-
rack. Vide Vent.
331, according.
2 Keble 514.
Raymond 182. (e) 3 Keble 48, (30) If a man be charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue. Stra. 184. And it hath been held, upon consideration that *ratione tenuræ* is sufficient without *factum*. Strange 187.

Sett. 90. Fifthly, That it is not safe in an indictment against a common person for not repairing a highway, which he ought to have done in respect of the tenure of certain lands, barely to say that he was bound to repair it *ratione tenuræ terre*, without adding (d) *factum*. (30) Also it is said, That in an indictment against a (e) bishop, &c. for not repairing a highway, in respect of certain lands, it ought to be shewn in what capacity he ought to repair it, because otherwise it cannot be known in what capacity the process is to be awarded against him.

Raymond 182. (e) 3 Keble 48, (30) If a man be charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue. Stra. 184. And it hath been held, upon consideration that *ratione tenuræ* is sufficient without *factum*. Strange 187.

11 Modern 56.
3 Anderson 234.
Popham 206.

Sett. 91. Sixthly, That in every such indictment the fact alledged against the defendant must be expressed in such proper terms, that it may clearly appear to the court to have been a nuisance; and for this cause it hath been resolved, That a presentment for diverting a highway is not good, because a highway cannot be diverted, but must always continue in the same place, where it was, howsoever it be obstructed, and a new way made in another place.

2 Roll. Abr. 79,
81.

Sett. 92. Seventhly, That an indictment against a man for stopping a highway in his own land is good, without laying the offence done *vi & armis*. Also it is said, That a presentment that a highway in such a place is decayed by the defaults of the inhabitants of such a town, is good without naming any person in certainty. But it hath been adjudged, That an indictment against particular persons must specially charge them every one; for which cause it hath been resolved, That an indictment against several for not repairing their streets, that they, & *eorum uterque*, did not repair them, is not good.

Sett. 93.

Sect. 93. Eighthly, That the defendants ought not to plead *quod non debent reparare*, without shewing who ought.

1 Sid. 140.
Carthew 213.
11 Modern 273.
12 Modern 13.
Salkeld 358.
5 Modern 163.

Sect. 94. That the defendants shall not be discharged by submitting to a fine, but a distringas shall go *in infinitum* till they repair.

APPENDIX THE FOURTEENTH. (a)

(a) Vide ante,
page 244.

OF TURNPIKE ROADS.

THE turnpike roads of England are placed under the management and direction of certain bodies of trustees, who are usually named and appointed by the respective acts of parliament which are occasionally passed for the purpose of making, repairing, and sustaining the particular roads therein specified. But the powers of these statutes being confined to separate and distinct objects, it was thought expedient to pass some general laws which should apply in common to all trustees and turnpike roads in general, throughout the kingdom. These laws I shall endeavour to comprize under the following particulars:

Vide Scott's Digest of the highway and turnpike road acts *passim*.

1. As to trustees.
2. As to weighing engines; the weight allowed; and tolls.
3. As to carriages.
4. As to exemptions from toll.
5. As to statute duty and repairs.
6. As to materials for repairs.
7. As to nuisances.
8. As to subscribers and mortgagees.
9. As to officers in general.
10. As to repairing altered roads.
11. How far the powers of the highway act may be adopted.
12. As to the modes of proceeding.

Sect. 1. First, As to trustees, it is recited, that many mischiefs have arisen from mean persons acting in that capacity, in the execution of those acts of parliament, as have incautiously omitted to direct that trustees shall be possessed of property to a certain value: it is therefore enacted by the general turnpike act, 13 Geo. 3. c. 84. (1) f. 44. "That no trustee shall be qualified for that office, unless he shall, in his

Trustees, how to be qualified.

hereafter be made for the amending or repairing any particular turnpike roads in England.

(1) By 1 Geo. 3. c. 20. this act is extended to all acts of parliament which have been made since, and which shall

own or his wife's right, be in the actual possession or receipt of the rents and profits of lands, tenements, or hereditaments of the clear yearly value of 40l. or possessed of or intitled to a personal estate worth 500l. or shall be heir apparent to a landed estate of 80l. a year; and unless (not being such heir apparent) he shall take and subscribe the oath in the act recited, before two or more of the trustees appointed by such act; and if he shall presume to act as a trustee, without being thus qualified, he shall forfeit 50l. to any person who shall sue for the same, who shall recover, without any other proof or evidence, that such person hath acted as a trustee, except such person shall prove that he is qualified in the manner above mentioned."

No publican can be a trustee.

Sec. 2. And it is further enacted, par. 46. "That no person who shall keep any victualling-house, ale-house, or other house of publick entertainment, or who shall sell any wine, cyder, beer, ale, spiritous, or other strong liquors by retail, shall be capable of acting as a trustee, or of holding any place of trust or profit under the trustees, or of collecting the tolls. But no such person shall be precluded from farming such tolls, provided he employs a person to collect them, who shall not be under such incapacity."

What shall be evidence of a trustee.

And it is further enacted, par. 64. "That in all cases where any action shall be brought against any trustee, evidence of acting as such, together with the act of parliament by which he or they were appointed, or the order, or a copy of the order for the appointment or election, &c. shall be sufficient proof his being trustee."

Their meetings regulated,

† *Sec. 3.* And it is further enacted by the said statute, par. 49. amended and explained by 18 Geo. 3. c. 63. "That in all cases, where the trustees appointed by any act of parliament, shall not meet on the day appointed for their first meeting by any such act; or on any day appointed by adjournment; or have not adjourned in the manner directed by any such act; or when the day appointed for the first meeting of the trustees has elapsed before the passing of any such act; any five or more of the trustees appointed to execute such act, shall and may, in any or either of the cases aforesaid, cause notice under their hands to be affixed on all the turnpike gates, which shall be then erected on the roads for which they are trustees; or if no turnpike gate shall be then erected, shall cause the like notice to be affixed in some conspicuous place, in one of the market towns near the roads directed to be repaired, and also shall publish in some newspaper circulated in that part of the country, at

“ least *twenty days* before the intended meeting appointing the trustees to meet at the place where the last preceding meeting was appointed to be held; or at the place directed for the first meeting of such trustees, if no preceding meeting shall have been held, and the said trustees, when met in pursuance of such notice, shall and may carry such act or acts into execution, in the same and as full and ample a manner, as if no such neglect or omission had happened, or such act had been passed previous to the time appointed for the first meeting; and such trustees had met accordingly.”

† *Sect. 4.* But it is provided by 13 Geo. 3. c. 84. s. 50. In what manner the meetings shall be adjourned.
 “ That no meeting of such trustees shall be adjourned for any longer time than three calendar months, from the day on which such adjournment shall be made; and that no business shall be done at any meeting before ten in the forenoon; and no adjournment shall be made to any hour later than two in the afternoon, on which such meeting shall be appointed to be held; and that every act agreed upon at such meeting shall be signed, at the meeting, by a competent number of trustees, or otherwise such meeting, adjournment, and act respectively, shall be void.”

† *Sect. 5.* And it is further enacted, par. 51. “ That if the trustees abuse or exceed their power, by erecting, or continuing any gate or turnpike, where they have not any power by virtue of any act, the justices of the limit where any such gate or turnpike shall be erected or continued, in their general quarter sessions assembled, upon complaint of such abuse or excess of power in such trustees, shall in a summary way hear and determine the same, and thereupon to order the sheriff of the county, who is hereby authorised and required to execute such order to remove the same.” If they exceed their power in erecting gates, the justices may order the gates to be removed.

† *Sect. 6.* And it is further enacted, par. 84. “ That where any oath is required to be taken by this act, the justices of any limit, or the trustees of any turnpike road, as the case may be, according to their several jurisdictions, are empowered to administer the same.” May administer oaths. Vide highway act, Sect. 78. Ante, p. 419.

† *Sect. 7.* And whereas there are no powers given to the trustees to let or farm out the tolls arising upon turnpike roads, and in many cases where the particular acts have given such power, they are not executed in the most beneficial manner for such roads; it is therefore enacted, par. 31. “ That any seven trustees; at a publick meeting, may let to farm the tolls of the several gates erected upon their respective turnpike roads, viz. The trustees shall cause notice to be given of Trustees may farm out the tolls. Under particular directions and restrictions.

Vide ante,
p. 397.

“ upon the turnpike roads under their care, with proper inscriptions and figures thereon, denoting the names and distances of the principal towns and places on each respective road, and from time to time shall repair such stones and posts, and keep and continue legible the inscriptions thereon respectively.”

May erect
weighing
engines.

(3) But it hath been adjudged that toll-gates should not be erected in the middle of great towns, so as to obstruct the necessity in-
tercourse.
§ Burr. 377.

SECT. 16. Secondly as to weighing engines; the weight allowed, and additional toll. It is further enacted by the said statute, par. 1. “ That all trustees appointed by any act of parliament for any turnpike road in England, or any five or more of them, at some publick meeting, if they shall think proper, at as many turnpike gates as they shall erect (3) for the receiving toll; or upon any part of the road within their respective jurisdictions, and at such a distance as they shall think expedient, shall and may cause to be erected a crane, machine, or engine, proper for weighing of carts, waggons, or carriages, conveying of any goods or merchandize whatever; and by writing signed by them, or any five or more of them, shall and may order every such carriage which shall pass loaded through every such gate or bar, to be weighed with the loading thereof.”

But it is provided by sect. 34. “ That no toll gate shall be erected on the side of any turnpike road, unless ordered by the trustees, at a meeting, of which 21 days publick notice shall have been given in writing affixed upon all the toll gates, erected on such roads; and also in some publick news-paper circulated in that part of the country, specifying the place where such side gate is proposed to be erected, and unless nine trustees at least (being a majority of those present) shall sign the said order at such meeting; and that no person shall be liable to pay toll at any toll gate erected, or to be erected, across or on the side of any turnpike road, or be subject to any penalty for any carriage, horse or beast, which shall only cross such road, and shall not pass above 100 yards thereon, except over some bridge erected at a considerable expence by the trustees of such turnpike road.”

The burden
with which car-
riages are al-
lowed to pass.

† SECT. 17. And it is further enacted, by par. 1. “ That the trustees shall take, over and above the tolls, a certain sum for every 112 lb. which every such waggon or cart, together with the loading shall weigh over and above the following weights: To every four-wheel carriage, having felloes of 16 inches, 8 tons in summer, and 7 in winter.—To every waggon or wain, having the axletrees thereof of such different lengths that the distance from wheel to wheel of the nearer pair of the said wheels be not more than 4 feet 2 inches, to be measured at the ground, and that the distance from wheel to wheel of the other pair thereof

“ thereof be such, that the fore and hind wheels of such wag-
 “ gons and wains shall roll only one single surface or path of
 “ 16 inches wide at the least; on each side of the said waggons
 “ or wains, and having the fellies thereof of the breadth of 9
 “ inches from side to side at the bottom or sole thereof, 6 tons
 “ 10 hundred in summer, and 6 tons in winter.—To every wag-
 “ gon or four-wheeled carriage, having the sole or bottom of
 “ the fellies of the wheels of the breadth of 9 inches, 6 tons in
 “ summer, and 5 tons 10 hundred in winter.—To every cart,
 “ having the fellies of the same dimensions, 3 tons in summer,
 “ and 2 tons 15 hundred in winter.—To every waggon, having
 “ the sole or bottom of the fellies of the wheels of the breadth
 “ of 6 inches, 4 tons 5 hundred in summer, and 3 tons 15 hun-
 “ dred in winter.—And to every such waggon so constructed
 “ as to roll and actually rolling a surface of 11 inches, by the
 “ wheels thereof, 5 tons 10 hundred in summer, and 5 tons in
 “ winter.—To every cart, having fellies of the wheels of the
 “ same dimensions, 2 tons 12 hundred in summer, and 2 tons
 “ 7 hundred in winter.—To every waggon, having the sole or
 “ bottom of the fellies of the wheels of less breadth than 6 inches,
 “ 3 tons 10 hundred in summer, and 3 tons in winter.—And
 “ to every cart, having the fellies of the wheels of the same di-
 “ mensions, 1 ton 10 hundred in summer, and 1 ton 7 hun-
 “ dred in winter.—And for the several purposes aforesaid, it shall
 “ be deemed summer from the 1 May to 31 October both inclu-
 “ sive, and winter from 1 Nov. to 30 April, both inclusive.”

† *Stat.* 18. And by 14 Geo. 3. c. 82. “ All trustees or any
 “ five or more of them are empowered to take and receive
 “ over and above the tolls already granted, the following sums
 “ of money: For every 112 lb. which any waggon, cart, or
 “ carriage, together with the loading, shall weigh at any
 “ weighing engine, over and above the weights allowed as
 “ above, *viz.*—For the 1st, and 2 cwt. 3 *d.* each.—For every
 “ cwt. such over weight above 2 cwt. and not exceeding 5 cwt.
 “ 6 *d.*—For every cwt. of such over weight above 5 cwt. and
 “ not exceeding 10 cwt. 2 *s.* 6 *d.*; for every cwt. of such
 “ over weight above 10 cwt. and not exceeding 15 cwt. 5 *s.*—
 “ For every cwt. of such over weight above 15 cwt. 20 *s.*
 “ The money arising from such additional tolls to be applied
 “ to the roads where they are collected. But the trustees
 “ within 10 miles of *London, Westminster, and Southwark*, are
 “ empowered at their general or quarterly meetings to lower
 “ the additional tolls hereby directed to be taken as aforesaid,
 “ as to them shall seem fit.”

The additional
 toll to be paid for
 extra weight.

† *Stat.* 19. And it is further enacted by 13 Geo. 3. c. 84.
 § 9. That any trustee, clerk, treasurer, or surveyor,
 on suspicion of fraud, may cause any carriage liable to be
 weighed which shall have passed through any toll-gate where

Trustees, &c.
 may personally
 cause carriages
 to return to
 the weighing
 such engine.

“such weighing engine shall be erected, and shall not have
 “passed above 300 yards beyond such toll-gate, to return to
 “such weighing engine, and be then weighed with the load-
 “ing which passed through such gate in the presence of the
 “said trustees, creditor, clerk, treasurer, or surveyor, upon
 “requiring the driver thereof to drive back to such weighing
 “engine, and upon tendering him 1*s.* for so doing, which
 “shall be returned to the person paying the same, if the weight
 “shall be found excessive.”

† *Secl.* 20. And it is further enacted by 13 Geo. 3. c. 84.
 f. 2. “That every toll-gate keeper, where such engine shall be
 “erected, shall weigh all such carriages as he shall suspect to
 “be laden with greater weights, and receive the additional
 “tolls, upon pain of forfeiting 5*l.*”

Trustees shall
 make places for
 the carriages
 to turn.

And it is further enacted by par. 4. “That the trustees
 “shall cause the surveyors to make convenient places for
 “turning such carriages where such weighing engine shall be
 “erected, within 300 yards of such toll-gate, on each side
 “thereof, if the ground will admit of the same. And a list
 “of the names of all the trustees, creditors, the clerk, trea-
 “surer, and surveyor, shall be put up in the house where
 “such weighing engine shall be placed, to be inspected by
 “the owner or driver of every such carriage: and if the
 “driver refuse to return, he shall forfeit 40*s.* and any peace
 “officer or other person being present upon such refusal,
 “may drive such carriage back, in order to be weighed as
 “aforesaid.”

The names of
 the trustees, &c.
 shall be affixed
 in the house.

Driver refusing
 to return,
 40*s.* &c.

Carriages ex-
 empted from be-
 ing weighed.

† *Secl.* 21. But it is enacted by 14 Geo. 3. c. 82. “That
 “no waggon, cart, or carriage employed in husbandry, or
 “carrying only manure or lime for the improvement of land;
 “as hay, straw, fodder, or corn unthreshed, (excepting hay
 “or straw carried for sale), shall be weighed at any weighing
 “engine.”

Justices upon
 complaint made,
 may order
 weighing en-
 gines to be erec-
 ted where they
 think proper.

† *Secl.* 22. And it is provided by 13 Geo. 3. c. 84. f. 7.
 “That the justices at general quarter sessions, upon complaint
 “by any justice or two creditors, or two trustees, that such
 “turnpike road is much damaged by excessive weights, and
 “that no engine hath been erected upon the same, may sum-
 “mon the clerk, surveyor, and treasurer of such turnpike
 “road, to their next general quarter sessions, to shew cause
 “why the same should not be erected at or near such gates,
 “upon such turnpike roads as shall be described in such sum-
 “mons; and if at such subsequent sessions the said clerk,
 “surveyor, and treasurer, some or one of them, shall not
 “appear, or appearing, shall not shew sufficient cause against
 “the erecting thereof, the said justices, at such quarter ses-
 “sions,

“ fions, may order one or more weighing engine at such
 “ place; a copy of which order shall be forthwith delivered to
 “ the clerk of such road; and the trustees, at their next meet-
 “ ing, after their clerk shall have been served with such
 “ copy of the order, may contract with proper persons for
 “ the making and erecting the same; and the treasurer shall
 “ pay the expences thereof, out of the money which shall
 “ then be, or next come into his hands from the tolls arising
 “ upon such turnpike road.”

† *Sett.* 23. It is also provided by said statute, par. 8. “ That
 “ when turnpike roads meet at or near the same place, the
 “ trustees respectively shall fix upon some convenient place
 “ to erect a weighing engine upon, which will accommodate
 “ all such roads, and proportion the expences thereof, and
 “ forfeitures at such engine, amongst all such turnpike
 “ roads.”

Where two or
 more roads
 meet, trustees
 may erect one
 weighing engine
 to accommodate
 them.

† *Sett.* 24. And it is further enacted, par. 9. “ That the
 “ trustees or their lessee shall not make composition for tolls,
 “ in respect of any carriage, or horses, or beasts of draught,
 “ drawing the same, unless they have the fellies of the wheels
 “ of the breadth of six inches, or more.”

Trustees not to
 make composi-
 tion for tolls,
 unless waggons,
 &c. have the
 fellies of wheels
 of six inches
 broad.

† *Sett.* 25. And it is further enacted, par. 10. “ That if
 “ any person shall unload goods from any carriage, (except
 “ such carriages as are before excepted), before the same shall
 “ come to any turnpike gate or weighing engine, or shall
 “ load upon such carriage, (except as aforesaid), after the same
 “ shall have passed any such turnpike or weighing engine, any
 “ goods, taken from any horse, or other carriage, belonging
 “ to, or hired, or borrowed by the same waggoner or carrier,
 “ in order to avoid the payment of the additional duties, as
 “ aforesaid; and if any person shall so unload, in order to
 “ carry considerable quantities of goods through any turnpike
 “ gate, in one and the same day, and thereby pay less toll at
 “ such turnpike gate than would have been paid if such goods
 “ had not been so unloaden, on conviction before one justice,
 “ upon the oath of one witness, he shall forfeit five pounds.
 “ And each and every driver, not being the owner, who
 “ shall so offend, on conviction, as aforesaid, shall be com-
 “ mitted to the house of correction for one month.”

5 l. penalty on
 unloading goods
 before coming
 to any gate or
 weighing en-
 gine.

† *Sett.* 26. And it is further enacted by par. 11. “ That
 “ if the owner of any carriage, or the driver travelling on
 “ any turnpike road, where any toll gate or weighing engine
 “ is erected, shall drive or turn out of the same into any other
 “ road, in order to avoid being weighed, or paying toll, and

Penalty for
 avoiding the
 weighing en-
 gine.

“ shall afterwards proceed with such carriage into, and on the
 “ same turnpike road, every such owner or driver, convicted
 “ as aforesaid, shall forfeit, if he be the owner, any sum not
 “ exceeding 5 *l.* nor less than 20 *s.*; and if he be the driver,
 “ and not the owner, not exceeding 50 *s.* nor less than 10 *s.*
 “ for every such offence.”

(4) N. B. By
 sect. 67. of this
 act, two oxen or
 neat cattle are to
 be considered as
 equal to one
 horse, in the
 same manner as
 by the highway
 act. Sect. 59.
 Vide ante,
 p. 411.

(5) By sect. 68.
 carriages to have
 names and de-
 scriptions on
 them, in the
 same manner as
 directed by the
 highway act.
 Sect. 6c. Ante,
 p. 412.
 Vide Burrrow
 2258.

† Sect. 27. Thirdly, As to carriages, It is enacted, by
 13 Geo. 3. c. 84. §. 13. “ That no four wheeled carriage,
 “ having the bottom of the fellies nine inches broad, shall
 “ be drawn on any turnpike road with more than eight horses.
 “ (4) Nor any two wheeled carriage, having wheels of the
 “ breadth aforesaid, with more than 5 horses. And the
 “ horses shall draw in pairs, (except an odd horse in any
 “ team, and except where the number of horses shall not ex-
 “ ceed 4). And also, that no four wheeled carriage, (5) ha-
 “ ving the bottom of the fellies, of the breadth of 6 inches,
 “ shall be drawn in any turnpike road with more than 6
 “ horses; and that no two wheeled carriage, having wheels
 “ of the breadth last mentioned, shall be drawn with more
 “ than 4 horses; and no four wheeled carriage, having fel-
 “ lies less than 6 inches, with more than 4 horses; and no
 “ two wheeled carriage, having fellies less than 6 inches,
 “ with more than three horses; and the owner shall forfeit
 “ 5 *l.* and the driver, not being the owner, 20 *s.* for every of-
 “ fence, to any person who shall sue for the same.”

Rollers with flat
 surfaces may be
 drawn with any
 number of
 horses.

And by 14 Geo. 3.

c. 31. §. 5. all such carriages shall only pay half the tolls directed by this act.

Prosecutions not
 to be commen-
 ced, unless in-
 formation be
 laid within three
 days after the
 offence is com-
 mitted.

† Sect. 28. Provided, by par. 14. “ That all carriages
 “ moving upon rollers of 16 inches on each side thereof, with
 “ flat surfaces, may be drawn with any number of horses, or
 “ other cattle.”

† Sect. 29. Provided always, by par. 15. “ That no pro-
 “ secution shall be commenced before a justice by informa-
 “ tion, for any forfeiture incurred by the owner or driver ha-
 “ ving a greater number of horses, unless such information be
 “ laid within three days after the offence committed; and no
 “ action, unless commenced within one calendar month; and
 “ neither such information or action, unless notice be given by
 “ the informer to the driver on the day the offence shall be
 “ committed, of an intention to complain of such offence;
 “ and if the offender lives so remote as to make it inconve-
 “ nient to summon him, the justice may dismiss the com-
 “ plaint, and leave the informer to his remedy by action at
 “ law.”

Penalty for tak-
 ing off horses,
 &c.

† Sect. 30. And it is further enacted, par. 17. “ That if
 “ any person shall take off any horse, or other beast of
 “ draught, from any carriage, or shall alter the distance of the
 “ wheels

“ wheels before the same shall come to any of the turnpikes,
 “ with intent to avoid any toll forfeiture or penalty for draw-
 “ ing with a greater number of horses, or beasts of draught,
 “ than is hereby allowed on conviction before one justice,
 “ upon the oath of one witness, shall forfeit 5*l*.”

† *Secl*. 31. And it is further enacted, par. 18. “ That if
 “ it shall appear to the trustees, or any seven of them, at any of
 “ their publick meetings, by the oath of one witness, experi-
 “ enced in levelling, that any part of the rise of any hill shall
 “ be more than 4 inches in a yard, they may allow such
 “ number of horses as they shall judge necessary, not exceed-
 “ ing 10, for waggons with 9 inch wheels, nor 6, for carts
 “ with 9 inch wheels, and not exceeding 7, for waggons
 “ with 6 inch wheels, nor 5, for carts with 6 inch wheels;
 “ and not exceeding 5, for waggons with wheels of less
 “ breadth than 6 inches, nor 4, for carts with wheels of less
 “ breadth than 6 inches. And in case it shall appear to the said
 “ trustees, in manner aforesaid, that the whole rise of any hill
 “ taken together shall be more than 4 inches in a yard upon
 “ an average, the said trustees, or any seven of them, may
 “ allow such number of horses as they shall think fit to be used
 “ in such waggons and carts respectively, for the purpose only
 “ of drawing the same up such hill or hills, as aforesaid, the
 “ length and extent of such hill or hills to be specified in such
 “ order of allowance, and the termination at each end thereof
 “ to be marked by a post or stone, to be erected at such respec-
 “ tive boundaries; and the said order of allowance shall be
 “ certified by the said trustees, or their clerk, to the next ge-
 “ neral quarter sessions, of the limit within which such hill or
 “ hills shall respectively be situated: and if the facts shall be
 “ proved upon the oath of one witness to the satisfaction of
 “ the bench, the said order shall be confirmed and filed, or
 “ otherwise vacated and quashed: and from and after such
 “ confirmation and filing, no person shall be liable to any pe-
 “ nalty or forfeiture for using such number of horses as shall
 “ be so allowed in drawing any waggon or cart up such hill
 “ or hills respectively; and the said justices, at any subsequent
 “ quarter sessions of the peace, may reconsider the said order
 “ of allowance, and to discharge the same, if they think
 “ fit.”

They may al-
 low such num-
 ber of horses as
 they think fit,
 up hills rising
 more than 4
 inches in a yard,
 to be specified in
 the order of al-
 lowance.

But a justice of
 the peace, or
 any court of
 justice, may stop
 all proceedings
 for these pen-
 alties, if it appears
 by one witness
 that the addi-
 tional horses
 were necessary
 by reason of deep
 snow, &c. as by
 13 Geo. 3. c. 70.
 s. 59. recited
 ante, p. 411.

† *Secl*. 32. And it is further enacted, par. 20. “ That no
 “ carriage, having the bottom of the fellies of less breadth than
 “ 9 inches, shall pass upon any turnpike road drawn by horses
 “ in pairs, other than, and except such carriages, having the
 “ fellies of 6 inches, as shall be authorised to be drawn in
 “ any other manner by the order of trustees, within their dis-
 “ trict, made at a publick meeting, consisting of seven trustees
 Vol. I. F f “ or

“ or more, which order the said trustees may revoke at any subsequent meeting, and afterwards make a new one fixed in writing upon every toll gate within such district, and except carriages drawn by two horses only.”

† *Secl.* 33. And it is also enacted, par. 59. “ That the justices of the peace for Wales, at their general quarter sessions, to be held in the week after Michaelmas, may license an increase of the number of horses to be employed in drawing carriages on turnpike roads within their respective jurisdictions, over and above the number herein before limited, if the state of the roads make such an increase necessary, which order they may revoke, alter or vary at any subsequent Michaelmas session.”

For the manner in which they are to be marked vide ante, p. 412.

† *Secl.* 34. And it is further enacted, par. 21. “ That in case any person shall drive any carriage not being marked according to the directions of this act, or drawn by more than the number of horses, or beasts of draught, hereby respectively authorised, any constable, tythingman, surveyor, or other person, may apprehend and take such person before a justice where the offence shall be; and, on conviction by confession, or the oath of one witness, shall forfeit not exceeding 5*l.* nor less than 10*s.*”

† *Secl.* 35. And it is further enacted, par. 2. “ That the trustees appointed by any act of parliament for repairing particular roads, or any five or more, within their respective districts, at the first meeting after this act, do mitigate, lessen, and reduce the high and extraordinary tolls imposed by such certain particular acts, to an equality with the tolls and duties imposed by this act respectively.”

Waggons, &c. moving on rollers, of the breadth of 16 inches on each side, with flat surfaces, to pass toll free for one year, and then after paying one half of the toll.

† *Secl.* 36. Fourthly. As to exemptions from tolls: “ It is enacted, by 13 Geo. 3. c. 84. s. 26. and by 14 Geo. 3. c. 82. s. 5. That all carriages, moving upon rollers, of the breadth of 16 inches on each side, with flat surfaces, shall pass upon any turnpike road, through any toll-gate or bar, toll-free, upon paying only so much of the tolls and duties as shall not exceed one-half of the full toll or duty payable by this or any turnpike act, for all waggons, wains, or carts, having the fellies of the wheels of the breadth or gauge of 6 inches from side to side, or for the horses or beasts of draught drawing the same, and not rolling a surface of 16 inches on each side; and that no more than half toll shall be paid in respect of waggons having the fellies of the wheels thereof of the breadth of 9 inches, and rolling a surface of 16 inches on each side.”

† *Secl.*

† *Secl.* 37. Provided also, by 13 Geo. 3. c. 84. par. 27. Carriages to which the act does not extend.
 “ That nothing therein contained shall extend to any chaise-marine, coach, landau, berlin, chariot, chaise, chair, calash, or hearse, or to the carriage of such ammunition or artillery as shall be for his majesty’s service, or to any cart or carriage drawn by one horse, or two oxen, and no more; or to any carriage, having the sole or bottom of the fellies of the wheels thereof of the breadth of 9 inches, which shall be laden with one block of stone, one piece of marble, one cable rope, one piece of metal, or one piece of timber.”

Vide 4 Burrows 2260.

† *Secl.* 38. Provided also, by par. 28. “ That if any person shall take the benefit of any exemptions, under any act for the repair of any turnpike road, in any fraudulent or collusive manner whatsoever, he shall forfeit not exceeding 5*l.* nor less than 40*s.* for every such offence.”

Penalty on persons fraudulently taking the benefit of any exemption, is not to exceed 5*l.*

† *Secl.* 39. And it is enacted by 18 Geo. 3. c. 63. “ That no toll shall be taken for any horses belonging to officers or soldiers upon their march, or upon duty, or for any horses, cattle, or carriages employed in carrying their arms or baggage, or any sick, wounded, or disabled officers or soldiers; and no carriages so employed shall be weighed, or the owner or driver liable to any forfeiture for carrying greater weight than allowed by law.”

Baggage waggons exempted.

† *Secl.* 40. And it is further enacted by said statute 13 Geo. 3. c. 84. s. 24. “ That no person shall take exemption from toll, in respect of any carriage, or horse drawing the same, and carrying any particular kind of goods, unless such carriages have the sole of the bottom of the fellies of the breadth of 6 inches, or upwards, (other than and except carts and carriages employed in carrying corn, or grain in the straw, hay, straw, fodder, dung, lime for the improvement of land, or other manure, or any implements of husbandry only); but that the usual toll, together with the additional tolls hereby required to be taken for carriages having the bottom of the fellies of less breadth than 6 inches, as aforesaid, and for and in respect of horses or beasts of draught, drawing the same, (except as before excepted), shall be paid as if no exemption, or less toll, had been allowed, and as fully as all other carriages, and horses drawing the same.”

No exemption from toll by former acts to be claimed by any person, unless where carriages with six inch fellies are used.

Carts, &c. employed in husbandry excepted.

† *Secl.* 41. Provided, par. 25. “ That no person be allowed to take the benefit of any such exemptions, or to have the privilege herein-before given of compounding in respect of any carriage having the fellies of the wheels thereof of the breadth of 6 inches, or upwards, unless the fellies and the tire of such fellies shall lie flat.—And by 16

No benefit to be taken of exemptions, unless the fellies lie flat.

“ Geo. 3. c. 39. s. 2. the fellies or tire whereof shall not deviate more than one inch from a flat surface shall be taken to be flat, according to the intent and meaning of this act.”

† *Sec. 42.* And it is further enacted by 13 Geo. 3. c. 84. s. 60. “ That no toll shall be collected for carriages solely employed in carrying materials for the repair of any turnpike road or public highway, or for going to or returning from such employment.”

The mail coaches exempted from toll.

† *Sec. 43.* And it is further enacted by 25 Geo. 3. c. 57. “ That all carriages of what description soever, or horses which shall be employed in conveying from one part of this kingdom to another, the mail or packet which shall be made up under the authority and direction of the post-master general, or his deputies, shall be exempted, freed, and discharged from the payment of any tolls whatsoever, that shall or may be demanded for the passage of carriages or horses through any turnpike, toll-gate, or bar, at which any toll is collected by any act or acts of parliament now in force; and all turnpike keepers or toll collectors are hereby directed and required to permit such carriages and horses to pass through all and every turnpike, toll-gate, or bar, without demanding any toll or duty for so doing.”

All statute-duty to be performed in the parish, &c. where it arises.

† *Sec. 44.* Fifthly. As to statute duty, it is enacted by 13 Geo. 3. c. 84. s. 32. “ That surveyors shall cause the statute-duty required by the respective turnpike acts, and the compositions arising from the same, to be performed, laid out, and expended, upon the turnpike road lying within the parish, township, or place, from which such duty shall be required, and not elsewhere, and shall forfeit 40 s. for every misapplication thereof; and that where there are two or more turnpike roads under several acts of parliament within the same parish, township, or place, and the statute-duty shall exceed three days duty in the whole; two justices shall at some special sessions, adjust the statute-duty betwixt such turnpike roads and the other highways in such parish, township, or place, the said justices previously summoning the clerks and surveyors of such turnpike roads, and likewise the surveyors of the highways, who are hereby respectively required to attend such summons.”

If more turnpike roads than are in the same parish, and the statute-duty required to them exceeds three days, the justices may adjust the proportions.

† *Sec. 45.* Sixthly. As to materials for repairs, it is enacted by par. 61. “ That no surveyor shall gather any stones for the use of the highways, upon or from the common fields or inclosed lands or grounds of any person, without the consent of the occupiers of such lands or grounds, or a licence from a justice of the limit where such lands or grounds lie
“ for

“ for that purpose after having summoned such occupier to
“ come before him and heard his reasons, if he shall appear
“ and give any for refusing his consent.”

† *Sec.* 46. And it is provided par. 65. “ That satis-
faction shall be made by the trustees of turnpike roads for
“ all such materials as are got in several or inclosed lands (6)
“ or grounds in the same manner as satisfaction is to be made
“ respecting materials for the highways by virtue of 13 Geo.
“ 3. c. 78. s. 29.”

(6) Vide the
case of *Rex v.*
Manning. 1
Burrow 377 to
383.
Vide the clause
at length. *Ante*
p. 398. sect. 41.

† *Sec.* 47. And by par. 36. “ The surveyor of turnpike
roads with the approbation of the trustees, may, under the
“ like circumstances contract for the getting and carrying ma-
“ terials and shall be liable to the same penalties for having any
“ share in such contract, as the surveyor of highways may do
“ by 13 Geo. 3. c. 78. s. 50, recited at large in the preceding
“ chapter, page 403, section 45.

† *Sec.* 48. Seventhly. As to nuisances it is enacted by par.
37. “ That if the surveyor or other person having the care of
“ any turnpike road, shall knowingly suffer to be or remain,
“ for four days in any part thereof, within ten feet on
“ either side of the middle of such road any post, heaps
“ of stones, rubbish or earth, set up or raised on or above the
“ surface of the said road, by which the passage thereof shall or
“ may be obstructed, impeded, confined or straitened, (other
“ than and except posts, blocks, stones, or banks of earth fix-
“ ed in the ground, or raised for securing horse or foot roads or
“ passages for water, and all direction posts and stones) such
“ surveyor or other person shall forfeit 40s.”

Trustees may
direct prosecu-
tion for nu-
sances.

N. B. For
nuisances by
persons making
incroachments
within 30 feet
of the centre of

the road, or ploughing within 15 feet thereof, by which they incur the penalty of 40s. The same
clause is enacted by the 38th section of this act as is enacted by the 64th section of the highway
act for which vide *Ante* p. 409. section 63.

† *Sec.* 49. Eighthly. As to subscribers and mortgagees, it
is enacted by par. 35. “ That if any person shall agree to ad-
“ vance any sum of money, to be employed in the making
“ or repairing any turnpike road, or highway intended to be
“ made turnpike, and shall subscribe his, her, or their name
“ or names to any writing for that purpose; every such
“ person shall be liable to pay every sum or sums of money
“ so subscribed, according to the purport of such writing;
“ and in default of payment thereof within twenty-one
“ days after the same shall become payable, according to
“ the purport of such writing; and shall be demanded by
“ the person to whom the same is made payable by such
“ writing; or if no person be named therein for that
“ purpose by the treasurer, every such treasurer or other

Subscribers and
mortgagees.

“ person may sue for and recover the same in any of his majesty’s courts of record by action of debt, &c.”

Mortgagees shall account for the monies they receive for tolls.

† *Sec.* 50. And it is further enacted by the said stat. par. 52. “ That every mortgagee that hath taken or been in possession of any toll, gate, or bar set up or erected on any turnpike road, or of any lands or tenements, the rents and profits whereof are appropriated to the repair of any part of any turnpike road shall within 14 days after he, she, or they shall have received notice in writing from the trustees of such turnpike road or any 5 of them, render upon oath to be administered and taken by and before one justice or any one trustee an exact account in writing, to such trustees, or to any person appointed by them or any 5 of them to be named in such notice, of all monies received by such mortgagee or by any other person for their use and benefit or by their authority, at such toll, gate or bar or otherwise, and of what they have expended in keeping or repairing the same; and in case they shall neglect to render such account when required, in the manner herein directed, they shall severally forfeit and pay to the said trustees, 10*l.* to be recovered by the said trustees, or any 5 or more of them, or by the treasurer or clerk to the said trustees in a summary manner before one justice to be applied to the use of the respective road whereupon such toll, gate or bar shall be placed.

Penalty for notuing over.

† *Sec.* 51. And it is further enacted by par. 53. “ That if any such mortgagee, shall keep possession of any toll, gate or bar, or receive the tolls and duty thereof or of any such rents or profits as aforesaid after such mortgagee shall have received the full sum of money due on his mortgage and the interest thereof with costs, such mortgagee shall forfeit to the trustees double the sum of money he shall have received over and above the sum due as aforesaid, with treble costs of suit; to be recovered by the said trustees, or by the treasurer or clerk to such trustees by action of debt, &c. in any of his majesty’s courts of record; and applied as above mentioned.”

If the gate-keeper, who is discharged, refuses to deliver up possession of the house, &c. the justices may, by warrant, order him to be removed, with his goods.

† *Sec.* 52. Ninthly. As to officers in general, it is enacted, par. 54. “ That if any toll-gatherer or gate-keeper, who shall be discharged by the trustees, shall refuse to deliver up the possession of the house, &c. within two days after notice of his discharge; or if the wife or family of any such, who shall die, shall refuse within 4 days after such new appointment shall be made, as aforesaid; any justice by warrant shall order the constable, or other peace officer, to remove the persons, together with their goods, out of such house, and to put the new-appointed officer into the possession thereof.”

† *Sec.*

† *Secl.* 53. And it is further enacted, par. 55. “ That
 “ the gate-keeper or toll gatherer, and every surveyor shall,
 “ when required, by notice, in writing, from any 5 of the
 “ trustees, render upon oath, before one justice or trustee a
 “ true account in writing, of all monies received on account
 “ of such turnpike road, not before accounted for, under the
 “ penalty of 5*l.* to be recovered in a summary manner before
 “ any one justice, and applied to the use of the respective
 “ road on which such toll-gate shall be placed.”

Gate-keepers
 and surveyors to
 account upon
 oath, when re-
 quired by the
 trustees, or for-
 feited 5*l.*

† *Secl.* 54. And be it further enacted, par. 56. “ That
 “ no gate-keeper or other person renting the tolls and residing
 “ in any toll-house, shall be removeable by any justices, in
 “ pursuance of any laws for the regulation of the poor, unless
 “ he become chargeable to the parish; and that no such gate-
 “ keeper, or person as aforesaid, shall thereby gain a settle-
 “ ment; and that no tolls nor any toll-house, nor any person in
 “ respect of such tolls or toll-house shall be assessed to the poors
 “ rate, or any other publick or parochial levy whatsoever.”

No gate-keeper
 to be removed as
 a pauper, un-
 less actually
 chargeable, &c.
 nor shall gain
 a settlement, nor
 be assessed, &c.

† *Secl.* 55. And it is further enacted, par. 57. “ That if
 “ any toll-gatherer or gate-keeper shall suffer any carriage
 “ to pass through any toll gate or bar with any greater num-
 “ ber of horses, or beasts of draught, or with any carriage
 “ constructed or drawn in any other manner than is before
 “ directed, or without such names and descriptions painted
 “ thereon as are hereby directed, and shall not within one
 “ week proceed for the recovery of the forfeiture or penalty
 “ in the manner directed by this act, he shall forfeit 40*s.*”

Gate-keepers
 permitting hor-
 ses, or carriages
 otherwise than
 allowed by the
 act, or without
 proper inscrip-
 tions, &c. for-
 feited 40*s.*

† *Secl.* 56. And it is further enacted, by par. 45. “ That
 “ all officers, appointed by any act for the repair of turnpike
 “ roads, their executors or administrators, shall, within 10
 “ days after notice in writing by the trustees, or any 5 or
 “ more of them deliver up all books, accounts, papers, or
 “ writings whatsoever, relative to the execution of such res-
 “ pective offices on pain of forfeiting 20*l.*”

Clerks, treasur-
 ers, &c. to de-
 liver up their
 accounts.

† *Secl.* 57. And it is further enacted, par. 65. “ That
 “ every treasurer and surveyor shall, within one month after
 “ his appointment, give a bond to the trustees, with surety, in
 “ such penalty as the said trustees shall direct, for the paying
 “ and accounting for all money in his hands, or which he
 “ shall afterwards receive, as treasurer or surveyor, according
 “ to the directions of the several acts of parliament respecting
 “ such turnpike road, which bond shall be wrote upon paper
 “ without any stamp thereupon.”—But by 23 Geo. 3. c. 18.
 f. 15. this exemption from stamps is repealed.

Treasurers and
 surveyors shall
 give bond with
 surety to the
 trustees, for the
 money in their
 hands.

Vide sect. 72.

N B. Upon what evidence convictions are to be made, and who are good witnesses. Vide a similar clause 12 Geo. 3. c. 77. & 78. Ante, p. 414.

† Sect. 58. It is also enacted, p. 73. "That every constable, headborough, or tythingman, refusing or neglecting to put this act into execution, or to account for and deliver any forfeiture or penalty, according to the directions of this act, and every surveyor, toll gatherer, and all other persons employed for the repairing roads, as shall receive salaries or rewards, who shall wilfully neglect for one week after the offence committed to lay such information upon oath before a justice for the limit wherein such offence was committed, shall, upon due information upon oath before one justice, forfeit 10*l*."

† Sect. 59. And it is further provided, par. 74. "That any justice may act in the execution of this act, notwithstanding he may be a creditor or a trustee for repairing or amending the roads on which any offence contrary to this act was committed."

† Sect. 60. And it is further enacted, par. 75. "That whoever shall resist or make forcible opposition to any person employed in the due execution of this act, or any particular act made for amending any particular highway, or shall assault any collector in the execution of his office; or shall pass through any turnpike gate, rail, or chain, or other fence, set up by authority of parliament, without paying the toll appointed to be paid at such gate or other fence, or make rescue of cattle, or any other goods distrained by virtue of this act, or if any constable, headborough, or tythingman, shall refuse or neglect to execute any warrant granted by any justice, pursuant to the directions of this act, he shall, on conviction as above, forfeit not exceeding 10*l*. nor less than 40*s*. in the manner directed by 13 Geo. 3. c. 78. s. 72."

Persons liable to repair old highways turned or stopped up, shall be liable to repair a part of the new highway equal to the burden of the old one.

† Sect. 61. Tenthly, As to the repair of altered turnpike roads, it is recited by the said statute, par 63. "And whereas parts of highways or turnpike roads have been, or may be, diverted and turned by legal authority, to make the same nearer or more commodious to the publick; and doubts have arisen, whether the inhabitants, or any particular person, is liable to repair the old highway or road, so deviated from by statute duty, tenure, or otherwise, ought to repair, or contribute to the repair of the whole, or some, and what part or proportion of such new highway or road. For obviating which doubts, and preventing disputes about the same. be it enacted, par. 63. "That the inhabitants of every parish, township, or place, and persons liable as aforesaid, to the repair of any such old highway or road, shall respectively be and continue in the same manner liable to the repair

“ repair of such new highway or road, or so much thereof as
 “ shall be equal to the burden and expence which he shall be
 “ exonerated, by turning the same, as aforesaid,; and that if
 “ the parties cannot agree, the same shall be viewed by two
 “ justices, and settled, adjusted, and determined by them; and
 “ from and after such determination of the justices, the inha-
 “ bitants, or the person liable to repair, shall bear all charges
 “ and expences of indictments and prosecutions for not repair-
 “ ing the same: and if it shall be found more convenient to
 “ fix a gross sum, or an annual sum, to be paid by any such
 “ inhabitants or person, instead of fixing the part or propor-
 “ tion of such new highway or road, to be repaired by him,
 “ the said justices may, with the consent of such person, and of
 “ the inhabitants interested therein, obtained at a vestry or
 “ publick meeting held for that purpose, and also of the trust-
 “ tees at a publick meeting, if it be turnpike road, order and
 “ direct the same accordingly; which order shall be, and for
 “ ever after continue, binding to all persons whomsoever.”

And if the parties cannot agree, it shall be viewed and settled by two justices of the peace.

A gross or annual sum may be paid, if the parties agree thereto.

† *Sec.* 62. And it is further enacted, par. 33. “ That
 “ when the inhabitants shall be indicted or presented for not
 “ repairing any highway, being turnpike road, and the court
 “ shall impose a fine, the same shall be proportioned, with the
 “ costs and charges, between the inhabitants of the parish,
 “ township, or place, and the trustees of such turnpike road;
 “ and the court shall order the treasurer to pay the sum so pro-
 “ portioned, if it shall appear that the same may be paid
 “ without endangering the security of the creditors who have
 “ advanced their money upon the tolls to be raised thereupon.”

Where turnpike roads are indicted, the court may proportion the fine and costs between the inhabitants and the trustees.

Without endangering the security of the creditors.

† *Sec.* 63. Eleventhly, How far the powers of the high-
 way act may be adopted, it is recited by the said statute, par.
 70. “ That whereas the powers given by several turnpike
 “ acts are ineffectual for the purposes of digging, providing,
 “ and carrying materials, for the use of the turnpike roads
 “ therein described, and also for the purposes of enlarging, di-
 “ verting, and turning such turnpike roads, and stopping up,
 “ selling, and disposing of the old roads so to be diverted and
 “ turned; and also for the making, opening, and cleansing of
 “ ditches and drains, and the cutting and pruning of hedges
 “ and trees; and also for the calling forth and compelling the
 “ performance of the statute duty which shall belong to such
 “ turnpike roads: and whereas more ample powers have been
 “ given in the acts for highways in general, (which highways
 “ comprehend and include turnpike roads); be it therefore
 “ enacted, That the surveyors shall, with the approbation of
 “ the trustees of every turnpike road, apply any part of the
 “ tolls and statute duty in the execution of all act or acts of
 “ parliament, for the amendment and preservation of the high-
 “ ways,

When the powers for providing materials, enlarging and turning turnpike roads, making drains, pruning hedges and trees, and calling forth the statute duty, are ineffectual.

And where more ample powers for these purposes are given by the highway act.

The surveyor of turnpike roads, with the approbation of the trustees, may execute and enforce these powers upon and for the benefit of the turnpike

roads, upon the terms, and under the restrictions in the highway act. “ways, and shall execute the same upon turnpike roads respectively, for the several purposes aforesaid.”

- † *Sec.* 64. Twelfthly, As to the modes of proceeding, it is enacted, by par. 72. in the words of the highway act, sect. 70.
- (1) *Ante*, p. 413. (1) “That the forms of proceeding contained in the schedule shall be used, and no objection or advantage shall be taken for want of form.—And by par. 74. the evidence upon which convictions are to be made is the same as by the highway act, sect. 77, and 78. (2)—And by par. 7. the manner in which penalties and forfeitures are to be levied and recovered by distress, is the same precisely as the highway act, sect. 73.
- (2) *Ante*, p. 414, sect. 76. (2) “By par. 77. the time for issuing the warrant is the same as, by the highway act, sect. 74. (4)—By par. 78. and 79. the application of the forfeitures are to be applied to the turnpike roads, and how forfeitures under 40 s. may be recovered, is the same as, by the highway act, sect. 75. excepting that the turnpike act gives full costs, and the highway act double costs, &c. (5)—The same notice to be given, as, by the highway act, sect. 76. (6)—By par. 80. the party grieved may recover satisfaction, as, by highway act, sect. 79.
- (3) *Ante*, p. 413, sect. 69. (7)—By par. 81. tender of amends the same as sect. 80.
- (4) *Ante*, p. 414. (8)—By par. 82. and 83. the appeal the same as, by highway act, sect. 81. (9)—By par. 85. the limitation, mode of pleading, and costs the same as, by highway act, sect. 82.”
- (5) *Ante*, p. 417. (9) *Ante*, p. 420.
- (6) *Ante*, p. 417, sect. 75.
- (7) *Ibid.* sect. 76.
- (8) *Ante*, p. 419, sect. 82.

Informations for penalties, in order to favour the offender, are deemed fraudulent and void.

† *Sec.* 65. And it is further enacted by the said statute 13 Geo. 3. c. 84. par. 48. That whereas fraudulent contrivances may be practised by offenders, their friends, and others, to evade the just recovery of forfeitures and penalties, by setting up colourable prosecutions, be it enacted, “That justices, where any information or conviction shall be set up by way of defence, or to defeat any information or proceeding on any forfeiture or penalty, inflicted as aforesaid, to examine into the real merits; and if it shall appear that the same was done to favour the offender, such information or conviction shall be deemed to be fraudulent, and null and void; and every such justice or justices shall determine and convict, as if no information or conviction had been made, prosecuted, or obtained.”

CHAPTER THE SEVENTY-SEVENTH.

OF NUSANCES RELATING TO BRIDGES.

AND now I am in the second place to consider nufances relating to bridges in particular; for the better understanding whereof I shall examine: How publick bridges are to be repaired by the common law. And how by the statute.

bridges nor banks, but such as of old time and of right have been accustomed. See also 2 Inst. 701. 1 Burr. 267.

By the great charter 9 H. 3. c. 15. No town nor freeman shall be distrained to make

As to the first point, I shall consider, First, In what manner, and by whom such bridges are to be repaired by common law. Secondly, In what manner persons bound to such repairs are to be proceeded against.

Self. 1. As to the first of these particulars it seemeth to be clear, That those who are bound to repair such bridges, must make them of such height and strength, as shall be answerable to the course of the water, whether it continue in the old channel, or make a new one; and that they are not punishable as trespassers for entring on any adjoining land, for such purpose, or for laying thereon the materials requisite for such repairs. Also it seemeth to be clearly (a) settled, That of common right the charge of repairing all common bridges, lies upon the county wherein they are, unless part thereof be within a franchise; in which case it is said, That so much as is within the franchise, shall be repaired by those of the franchise.

43 Affice p. 43. Dalton c. 14.

(a) 2 Inst. 701. Summary 143. C. Car. 365. 6 Modern 337. Salk. 358, 359.

Self. 2. Also it seemeth to be (b) certain, That such charge may be cast upon a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription, and that it may be cast upon any other persons (1) by reason of such a special tenure as hath been shewn more at large under the second general head of the precedent chapter. But it is (c) said, That a man shall not be bound to repair a new bridge built by himself, for the common

(b) 2 Inst. 700. 701. Summary 143. Dalton c. 14. Far. 54, 55.

(c) 2 Inst. 701. 6 Modern 307. Salkeld 359.

C. Car. 365. 2 Black. 685. Burr. 2594.

(1) Therefore a tenant at will of a house which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the house, yet if it become dangerously ruinous so the necessary intercourse of the bridge, as tenant at will only, he is bound, by reason of his possession, to repair it, so far as to prevent the public being prejudiced. Lord Raym. 856.

good:

good: but that the county shall be bound to repair it, if it become of publick convenience. (2)

(2) Therefore where a particular district rebuilt a foot-bridge over a more convenient part of the stream, and converted it into a bridge for horses, carts, and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built a quite different bridge, in a different place, which proved of common publick utility to the county, the Court were unanimous, that the county, and not the district, were bound to repair it. *Burr.* 2554. *Black.* 684.

Sec. 3. As to the second particular, viz. In what manner persons bound to such repairs, are to be proceeded against; it seemeth to be clear, (a) That any particular inhabitant or inhabitants of a county, or tenant or tenants of land charged to the repairs of such a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court for the default of such repairs, and shall be put to their remedy at law for a contribution from those who are bound to bear a proportionable share in the charge, for the necessity of the case requires the greatest expedition in cases of this nature.

(a) 1 Jon. 273.
Popham 162.
 6 Modern 307.
Salkeld 358.
 12 Modern 198,
 409.
Id. *Raym.* 725,
 792, 804, 856,
 858, 1169,
 1175, 1249.
 11 Modern 56.
F. N. B. 224.
Register 268.
 2 *Init.* 700. *Hard.* 131.

(b) 2 Lev. 112. *Sec.* 4. Also it hath been (b) resolved, That it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same; and it is said that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea.

(b) 2 Lev. 112.
Popham 192.
 43 *Affize* 37.
 8 Modern 120.
 43 *Affize* 37.
B. Prefement,
 22, and 29.

Sec. 5. It is said, That where such defendants plead, that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves, the attorney general in this special case may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alledged against *A. B.* and that an issue ought to be taken on such second traverse; and that the attorney general may afterwards surmise, that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury, &c. (3)

See 1 Sid. 140.
 2 *Levinz* 112.

(3) But the indictment ought to shew what sort of bridge it is, whether for carts and carriages, or for horses, or foot-men only. *Id.* *Raym.* 1175. And if the duty to repair arises by reason of the tenure of certain lands, the indictment must shew where those lands lie. 2 *Hale* 184. And for the form of an indictment, vide 1 *Burn* 281.

6 Modern 307. *Sec.* 6. It seems that no inhabitant of a county ought to be a juror for the trial of an issue, whether the county be bound to such repairs or not, but it is said that he may be a good witness. (4)

6 Modern 307.
Burrows 859.

(4) The same objection may lie against the justice where they are all interested. In which case the trial shall be in the next county. Vide *Burrow* 859, 860. But by 1 *Ann.* an inhabitant may be a witness. Vide post. sect. 20.

Sec.

Sett. 7. As to the second point, viz. In what manner such bridges are to be repaired by statute. It is enacted by 22 Hen. 8. c. 5. "That the justices of peace in every shire of this realm, franchise, city, or borough, or four of them at the least, whereof one to be of the *quorum*, may inquire, hear, and determine, in their general sessions, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment afore them, for the reformation of the same, against such as owen to be charged for the making or amending of such bridges, as the king's justices of his bench use commonly to do; or as it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges."

2 Inst. 701, 702.
6 Modern 255.

A remedy to
repair decayed
bridges.
13 Coke 33.
Popham 192.

Sett. 8. And it is farther enacted, par. 2 and 3. "That where it cannot be known and proved what hundred, riding, wapentake, city, borough, town or parish, nor what person certain, or body politick, ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lack of knowledge of such as owen to make them, for the most part lie long without any amendment, to the great annoyance of the king's subjects; in every such case the said bridges, if they be without city or town-corporate shall be made by the inhabitants of the shire or riding, within which the said bridge decayed shall happen to be: and if it be within any city or town-corporate, then by the inhabitants of every such city or town-corporate wherein such bridges shall be. And if part of any such bridges so decayed happen to be in one shire, riding, city or town corporate, and the other part thereof in another shire, riding, city or town-corporate, or if part be within the limits of any city or town-corporate, and part without, or part within one riding, and part within another, that then in every such case the inhabitants of the shires, ridings, cities or towns-corporate, shall be charged and chargeable to amend, make and repair such part and portion of such bridges so decayed, as shall lie and be within the limits of the shire, riding, city or town-corporate, wherein they be inhabited at the time of the same decays."

Justices may
proceed against
defaulters.

Sett. 9. And it is farther enacted, par. 4. "That in every such case where it cannot be known and proved what persons, lands, tenements, and bodies politick owen to make and repair such bridges, that for speedy reformation and amending of such bridges, the justices of the peace within the shires or ridings, wherein such decayed bridges being out of cities and towns-corporate, and if it be within cities or towns-corporate, then the justices of peace within every such city or town corporate, or four of the said justi-

Justices may tax
the inhabitants.
Vide 1 Keble
422.

ces

Vide infra.
12 Geo. 2.
Which seems
to make this
part of the act
useless.

Two collectors
to be made.
Sed vide infra. 1
Ann. c. 18. &c.

(5) The office
of surveyors, for
the sake of con-
venience, is
usually annexed
by the justices
to the office of
the high constables. 1 Burn
280.

ces at the least, whereof one to be of the *quorum*, within
the limits of their several commissions and authorities, may
call before them the constables of every town and parish,
being within the shire, riding, city or town-corporate, as
well within liberty as without, wherein such bridges or
any parcel thereof shall happen to be, or else two of the
most honest inhabitants within every such town or parish
in the said shire, riding, city or town-corporate, by the
discretion of the said justices of peace, &c. And at and
upon the appearance of such constables or inhabitants the
said justices of peace, &c. with the assent of the said con-
stables or inhabitants, may tax, and set every inhabitant in
any such city, town or parish, within the limits of their
commissions and authorities, to such reasonable aid and sum
of money, as they shall think by their discretions convenient
and sufficient for the repairing, re-edifying, and amending
of such bridges, and after such taxation made, the said
justices shall cause the names and sums of every particular
person so by them taxed, to be written in a roll indented:
and shall also have power and authority to make two col-
lectors of every hundred, for collection of all such sums of
money by them set and taxed, which collectors receiving
the one part of the said roll indented, under the seals of
the said justices, shall have power and authority to collect
and receive all the particular sums of money therein con-
tained, and to distrain every such inhabitant as shall be
taxed, and refuse payment thereof, in his lands, goods and
chattels, and to sell such distress, and of the sale thereof
retain and perceive all the money taxed, and the residue,
(if the distress be better) to deliver to the owner thereof:
and that the same justices, or four of them, within the limits
of their commissions and authorities, may also name and ap-
point two surveyors (5) which shall see every such decayed
bridge repaired and amended from time to time as often as
need shall require, to whose hands the said collectors shall
pay the said sums of money, taxed and by them received,
and that the collectors and surveyors, and every of them, and
their executors and administrators, and the executors and
administrators of them, and every of them, from time to
time, shall make a true declaration and account to the justices
of peace of the shire, riding, city, or town corporate, wherein
they shall be appointed collectors or surveyors, or to four
of the same justices, whereof one to be of the *quorum*, of
the receipts, payments and expences of the said sums of mo-
ney: and if they or any of them refuse that to do, that then
the same justices of peace, or four of them, from time to
time by their discretions, shall have power and authority to
make process against the said collectors and surveyors, and
every

“ every of them, their executors and administrators, and the
 “ executors and administrators of every of them, by attach-
 “ ments under their seals, returnable at the general sessions
 “ of peace: and if they appear, then to compel them to ac-
 “ count, as is aforesaid; or else if they, or any of them, re-
 “ fuse that to do, then to commit such of them as shall refuse
 “ to ward, there to remain without bail or mainprize, till the
 “ said declaration and account be truly made.”

Stat. 10. And it is farther enacted, par. 5. “ That where
 “ any bridge or bridges lying in one shire or riding, and such
 “ persons inhabitants, bodies politick, lands or tenements,
 “ which owen to be charged with the making and amending
 “ of such bridges, lien and abiden in another shire or riding,
 “ or where such bridges been within any city or town corpo-
 “ rate, and the persons inhabitants, bodies politick, lands or
 “ tenements, that owen to make or repair any such bridges
 “ lien and been out of the said cities and towns corporate, in
 “ every such case the justices of peace of the shire, city, or
 “ town corporate, within which such decayed bridges, or any
 “ part thereof, shall happen to be, shall have power to enquire,
 “ hear and determine all such annoyances, being within the
 “ limits of their commissions and authorities. And if the an-
 “ noyance be presented, then to make process into every shire
 “ within this realm, against such as owen to make or amend
 “ any such bridges so presented before them to be decayed, to
 “ the annoyance and let of the passage of the king’s subjects,
 “ and to do further in every behalf in every such case, as they
 “ might do by authority of the said act, in case that the per-
 “ sons, &c. which owen to be charged to the amending or
 “ making of such bridges, &c. were in the same shire, &c.
 “ where such annoyance shall happen to be. And that all
 “ sheriffs, and bailiffs of liberties and franchises, shall truly
 “ serve and execute process as shall come to their hands from
 “ the said justices of peace, afore whom any presentment shall
 “ be had for any such annoyance, according to the tenor and
 “ effect of the said process to them directed, &c. on pain to
 “ make such fine as shall be set on them by the discretion of the
 “ said justices.”

Justices may
 make process
 into every shire.

Which the she-
 riffs shall serve.

Stat. 11. But it is provided, par. 6. “ That nothing in
 “ the said act contained shall be prejudicial to the liberties of
 “ the five ports, or members of the same.”—And for reformation
 of annoyance of bridges within the said ports and members,
 it is farther enacted, par. 7. “ That the warden, mayors, and
 “ bailiffs elected, and jurats of the same ports, and every of
 “ them, have power and authority to enquire, hear, and de-
 “ termine all manner of common annoyances of bridges within
 “ the same ports and members, and to make such process, pains,
 “ taxations,

Cinque Ports
 excepted.

“taxations, and all other things within the same ports and members, as the justices of the peace may do in other shires or places out of the same ports, by virtue of the said act in every behalf.”

Allowance to collectors.

Sec. 12. And it is farther enacted, par. 8. “That the said justices, &c. may allow such reasonable costs and charges to the said surveyors and collectors, as by their discretion shall be thought convenient.”

Of roads at the ends of bridges.

Sec. 13. And it is farther enacted, par. 9. “That such part and portion of the highways in every part of this realm, as well within franchise as without, as lie next adjoining to any ends of any bridges within this realm, distant from any of the said ends by the space of 300 foot, be made, repaired, and amended, as often as need shall require; and that the justices of peace in every shire of this realm, franchise, city, or borough, or four of them at the least, whereof one to be of the quorum, within the limits of their commissions and authorities, may enquire, hear, and determine in their general sessions, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges within this realm, distant from any one of the ends of such bridges 300 foot, and to do in every thing concerning the making, repairing, and amending such highways, &c. in as large and ample manner as they might and may do to and for the making, repairing, and amending of bridges, by virtue of the said act.”

2 Inst. 701.
Salk. 359.
6 Mod. 255,
256.

† *Sec. 14.* In the construction of this statute the following opinions have been holden: First, That no private bridges are within the purview thereof, but only such as are common in the highways, where all the king's liege people have or may have passage.

2 Inst. 701, 702.

Sec. 15. Secondly, That unless the justices of the peace of a county, or town, &c. be four in number, and one of them of the quorum, they have no manner of jurisdiction by virtue of this statute; but it is said, That the justices of the peace of the county, in which such town, being not a county of itself, and wanting such a number of justices, shall lie, may, by virtue of the first clause of the statute, determine all annoyances of bridges within such town, &c. if it be known what persons in certain are bound to repair the same: but if it be not known, it seems that such annoyances are left to the remedy of the common law, because the clause, which in such case authorises the justices of the peace to tax all the inhabitants,

tants, seems expressly to confine the power of taxing the inhabitants of such towns to their own justice, &c.

Sec. 16. Thirdly, That all householders dwelling in any county or town, &c. whether they occupy any lands or not; and also all persons who have lands in their own possession or manurance, whether they dwell in the same county, &c. or not; and also all bodies politic, either residing in, or having lands in their own hands in a county, &c. are liable to be taxed as inhabitants, within the meaning of the statute. 2 Inst. 703.

Sec. 17. Fourthly, That the taxation to be made in pursuance of the statute ought to be assessed distinctly on each inhabitant, and not on a whole hundred, parish, or town in general. 2 Inst. 704.
Vide 1 Keb. 91.

Sec. 18. Fifthly, That all privileges of exemptions and discharges from contribution to the repairs of decayed bridges, whether such exemptions were originally derived from charter or act of parliament, or any other foundation whatsoever, are taken away by the express words of the statute, "That the justices, &c. shall tax and set every inhabitant." 2 Inst. 704.

Sec. 19. It hath been questioned whether a borough, which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 Keble 68.

† *Sec. 20.* And to prevent more money being raised than is necessary, and to direct the application of what is raised, it is enacted, by 1 Anne, st. 1. c. 18. "That the justices in sessions shall have full power, upon due presentment to them made that any bridge within their respective jurisdictions is out of repair, and which by them hath usually been or ought to have been repaired, to assess every town, parish, or place within their respective commissions in the usual proportions toward the repair of bridges, to be levied and collected by the constables or by such other person or persons, as the said justices in sessions shall direct, and paid by the said collectors to the high constables of every hundred in 6 days after they shall have received the same, and the high constables shall in 10 days after the receipt thereof pay the same to such person as the said justices shall, in sessions, appoint to be treasurers of the same (allowing the said persons not exceeding 3 d. in the pound) to be employed and accounted for according to the orders and directions of the said justices for and towards the amending of such decayed bridges and the highways at the end of such bridges as need shall require, which assessments shall be levied by distress within 10 days after demand, and every constable or other person

Vide the next section where the charges are directed to be paid out of the county rate.
Moore 103.
2 Hale 181.

G g

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“ person who shall neglect to assess, collect, or pay the money
 “ as aforesaid, shall forfeit 40s. and every treasurer that shall
 “ pay any money but by the order of the justices as aforesaid,
 “ shall forfeit 5*l.* and all fines, issues, penalties or forfeitures
 “ upon any presentment or indictment for not repairing, &c.
 “ shall be paid into the hands of the treasurer for the purposes
 “ aforesaid, and not into the exchequer. And all questions
 “ concerning the repairs aforesaid, shall be determined in the
 “ same county wherein they lie, and no presentment or indict-
 “ ment shall be removed by *certiorari* (a) out of the county
 “ into any other court, except the right of repairing by pri-
 “ vate persons (or by 5 & 6 Will. & Mary, c. 11. the right
 “ between parishes came in question) and on which question
 “ inhabitants are admissible witnesses. The general issue
 “ may be pleaded and this act and the 22 Hen. 8. may be
 “ given, with any special matter in evidence, and the plaintiff
 “ shall be liable to pay double costs.”

(a) A *certiorari* lies upon an order of justices concerning a private bridge, pursuant to a private statute; but they ought to return the act upon which their order is founded. Dalt.

504. And it has been determined that this act of Queen Ann extends only to bridges where the county is charged to repairs and that where a private person or parish is charged the 5. and 6 Will. 3. c. 11. hath allowed the granting a *certiorari*. Strange 900.

The expence of repairing bridges to be raised by a county rate.

† Sect. 21. It is also enacted, by 12 Geo. 2. c. 29. s. 13. for the more easy assessing, levying and collecting the county rates, “ That no part of the money to be raised and collected
 “ in pursuance of this act shall be applied to the repairs of any
 “ bridges, &c. until presentments be made by the respective
 “ grand juries, at the assize, great sessions, general gaol deli-
 “ very, or general or quarter-sessions of the peace, held for
 “ the county or place of the insufficiency, inconveniency, or
 “ want of reparation of their bridges, &c. &c.”

Justices may contract for the repair of bridges.

† Sect. 22. Also, it is further enacted, par. 14. “ That
 “ when any public bridges, ramparts, banks or cepts or other
 “ works are required to be repaired at the expence of any
 “ county or place, the justices of the peace at their grand
 “ or quarter sessions respectively, or the greater part of them
 “ then and there assembled, if they think proper and conve-
 “ nient, after presentment to be made as aforesaid of the want
 “ of reparation of such bridges, ramparts, banks or cepts,
 “ may contract and agree with any person or persons for re-
 “ building, repairing and amending the same, and all other
 “ works which are to be repaired and done by assessment in
 “ the respective counties or places, for any term or terms of
 “ years not exceeding seven years at a certain annual sum,
 “ payment or allowance for the same; such contractor or
 “ contractors giving sufficient security for the due perform-
 “ ance thereof to the clerk of the peace or other officer of the
 “ place respectively; and such justices at their respective
 “ general or quarter sessions shall give public notice of their
 “ intention

“ intention of contracting as aforesaid ; and such contracts
 “ shall be made at the most reasonable price proposed ; and
 “ all contracts when agreed to, and all orders relating thereto
 “ shall be entered in a book to be kept by the clerk of the
 “ peace or other officer respectively for that purpose, and kept
 “ among the records of the place, to be from time to time in-
 “ spected by any of the said justices within the limits of their
 “ commissions and by any person or persons employed con-
 “ cerning the same without fee or reward.”

† *Stat.* 23. It is also further enacted, by 14 Geo. 2. c. 33. Justices may purchase the adjoining land to rebuild.
 “ That the justices of the peace of any county or place, at
 “ their general sessions or general quarter sessions assembled or
 “ the major part of them, shall have power to purchase of, or
 “ agree, or contract with any person or persons, bodies poli-
 “ tick or corporate for any price or parcel of land adjoining
 “ or near to any county bridge within the limits of their res-
 “ pective commissions, for the more commodious enlarging,
 “ or convenient rebuilding of the same ; which pieces or
 “ parcel of land shall not exceed one acre in the whole for
 “ any such bridge and shall from time to time be paid for by
 “ the respective county treasurers out of any monies raised or
 “ to be raised by virtue of 12 Geo. 2. c. 29 ; such treasurers
 “ being thereunto authorised by orders under the hands and
 “ seals of the justices at sessions or the major part of them ;
 “ which lands so purchased shall be conveyed as the said jus-
 “ tices in sessions shall appoint, in trust, for the uses and pur-
 “ poses of enlarging or rebuilding such bridges respectively.”

CHAPTER THE SEVENTY-EIGHTH.

OF NUSANCES RELATING TO PUBLIC HOUSES.

FOR the better understanding of nuisances relating to public houses, I shall consider: In what manner they are prevented and restrained by the common law, and in what manner by statute.

Stat. 1. As to the first point it seems to be agreed, That the keeper of an inn may, by the common law, be indicted and fined, as being guilty of a publick nuisance (a) if he usual- (a) *Palm.* 374.
 ly harbour thieves, or persons of scandalous reputation, or (b) 2 *Roll.* 345.
 suffer frequent disorders in his house, or take exorbitant prices, (b) *Sum.* 146.
 or set (c) up a new inn in a place, where there is no manner Cro. Car. 549.
 of need of one, to the hindrance of other ancient and well Dalton c. 7.
 (c) *Sum.* 146.

(a) 2 Hale 174.
Dalt. c. 7.
Palm. 374.
2 Roll. 345.

governed inns, or (a) keep it in a place in respect of its situation wholly unfit for such a purpose.

(b) Palm. 374.
2 Roll. 345.
(c) 10 H. 7. 8.
39 H. 6. 18. 19.
9 Coke 87.
(d) Dy. 158.
B. Ac. fur. cas.
76. 92.
(e) H.P.C. 146.
Dalton c. 7.
(f) 5 E. 4. 2.
(g) Palm. 374.
2 Roll. 345, 346.
8 Co. Casev's
case. Blackerby 169. Cro. Eliz. 622. Brownlow 254. Keilw. 50. 11 and 12 Will. 3. c. 15.
f. 2. 1 Salk. 388. Moor 877. 12 Mod. 255. Clayt. 97. Godbolt 346. Carth. 150.
Shower 268.

Sett. 2. And it seems also to be clear, That if one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to find him victuals, or (b) lodging, upon his tendering him a reasonable (c) price for the same, he is not only liable to render (d) damages for the injury in an action on the case at the suit of the party grieved, but may also be (e) indicted and fined, at the suit of the king. Also it is said, That he may be compelled by the constable (f) of the town to receive and entertain such a person as his guest, and that it is no way (g) material whether he have any sign before his door or not, if he make it his common business to entertain passengers.

(b) 2 Roll. A.
84. 85.

Sett. 3. It seems to have been always clearly (b) agreed, That he who has an inn by prescription, may lawfully enlarge it upon the same land which has been used with it, either by erecting new buildings thereon, or turning stables into chambers of entertainment, and that he shall have the same privilege in such new parts of his house as in any of the old.

(i) 2 Roll. A. 84.
Salk. 45.
2 Roll. 345.
Palm. 367, 374.
2 Keb. 506.
1 Bullf. 109.
Salk. 45.
Blackerby 170.
Godbolt 345.
Hutton 100.
Cro. Jac. 528.

Sett. 4. Also it seems to be (i) settled at this day, That any person may lawfully set up a new inn, unless it be inconvenient to the publick in some of the respects taken notice of in the first section, and that he has no need of any licence from the king for this purpose, for the keeping of an inn is no franchise, but a lawful trade, open to every subject. But if an inn degenerate into an ale-house, by suffering disorderly tippling, it shall be deemed as such.

Dalton 56. 133.
204. Vide 455.
sect. 12.

But it is said by Dalton, that inn keepers ought to have licence and be bound by recognizance for keeping good order as ale-house keepers are.

1 Burrow 22.

And by the commission of the peace, two justices, one whereof shall be of the quorum, may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights and measures, or in the sale of victuals, against the form of the ordinances in that behalf made.

Vide F. N. B.
172.
Regifter 184.
Rait. 686.

Sett. 5. As to the second point, viz. In what manner nuisances of this kind are prevented and restrained by statute, it is enacted by 12 Edw. 2. c. 6. " That no officer in city or " in borough, that by reason of his office ought to keep " sizes of wines and victuals, so long as he is attendant to " that

“ that office, shall not merchandize for wines nor victuals,
 “ neither in grofs nor by retail; and if any be convict of
 “ fuch offence, the merchandize shall be forfeited to the king,
 “ and the third part thereof delivered to the party that sued
 “ for the fame, &c.”

Stat. 6. And it is farther enacted by 6 Rich. 2. c. 9. Repealed by 7 Rich. 2. c. 11.
 “ That no victualler shall have, exercise, or occupy any ju-
 “ dicial office in any town, but only where no other person
 “ sufficient may be found to have the same office. In which
 “ case yet the same judge, for the time that he shall continue
 “ in the said office, shall utterly omit and abstain himself and
 “ his from the exercise of victualling, upon pain of forfeit-
 “ ing his victuals so sold.”

Stat. 7. And it is farther enacted by 3 Hen. 8. c. 8.
 “ That as often as any victualler chosen to bear any office
 “ within any city, borough, or town-corporate, which for the
 “ time that he shall stand and be in such office should have the
 “ assessing and correction for selling of victuals, that then two
 “ discreet and honest persons of the same city, borough, or
 “ town-corporate, not being victuallers, nor any of them
 “ being a victualler, shall be chosen by the commonalty of the
 “ same city, borough, or town-corporate, in like form as
 “ the said officer shall be chosen : which two persons, with
 “ the said officer, shall be sworn truly to sell and set the prices
 “ and assizes of victual there, for the time that any such vic-
 “ tualler shall abide in the same office : And that then it shall
 “ be lawful to all and every of the said officers, after the same
 “ victuals be set and sold by the same officer, and the said
 “ two persons, or one of the same two persons, the other be-
 “ ing absent, to merchant and sell wines, and all other vic-
 “ tual in grofs, and at retail, during the time that he shall be
 “ in any such office, without any thing therefore to forfeit :
 “ The said statute, act, and ordinance of 12 Edw. 2. or any
 “ other act or acts, ordinance, or statute to the contrary made
 “ in any wise notwithstanding.”

Stat. 8. Also it is enacted by 21 Jac. 1. c. 21. “ That all Vide C. Jac. 609. 610. 2 Roll. 225, 226.
 “ hostlers or inn-holders shall sell their horse-bread, and their
 “ hay, oats, beans, pease, provender, and also all kind of vic-
 “ tual, both for man and beast, for reasonable gain, having
 “ respect to the prices for which they shall be sold in the mar-
 “ kets adjoining, without taking any thing for litter.”

And it is farther enacted by the said statute, “ That Carthew 150. Skin. 291. Raymond 162. Roll. Ab. 93. 9 Hen. 6. 53.
 “ every hostler and innkeeper dwelling in any town or village,
 “ being a thoroughfare, and no city, town-corporate, or mar-
 “ ket town, wherein any common baker, having been an ap-
 “ prentice to the trade for seven years, is dwelling, may make
 “ within

" within his house horse-bread sufficient, lawful, and of due
 " assize, according to the price of grain or corn; any thing
 " in the said statute contained to the contrary notwithstanding."
 " ing."

And it is farther enacted, " That if the horse-bread,
 " which any of the said hostlers or innholders shall make, be
 " not sufficient, lawful, and of due assize, according to the
 " price of grain and corn, as abovesaid; or that if any of
 " them shall offend in any thing contrary to this act, the jus-
 " tices of assize, justices of oyer and terminer, justices of
 " peace, in every shire, liberty or franchise within this
 " realm, sheriffs in their turns, and stewards in their leets,
 " may inquire, hear, and determine the said offences of the
 " said hostlers and innholders, who shall be fined for the first
 " offence, according to the quantity of the offence, and for
 " the second offence shall be imprisoned for one month, and
 " for the third shall stand upon the pillory, &c."

Before this statute it was lawful for any one to keep an ale-house without licence, for it was a means of livelihood which any one was free to follow. But if it was disorderly kept it was indictable as a nuisance. Salk. 45.

Stat. 9. And it is enacted by 5 and 6 Edw. 6. c. 25.
 " That the justices of peace within every shire, city, borough,
 " town-corporate, franchise, or liberty within this realm, or
 " two of them at the least, whereof one to be of the *quorum*,
 " shall have full power and authority within every shire, city,
 " &c. to remove, discharge, and put away common selling of
 " ale and beer in common ale-houses and tippling-houses."

Dalton c. 7.
Hutt 100.
Sum. 147.
Ld. Ray. 1303.
1405.

Stat. 10. And it seems to have been the general opinion in the construction of this clause, that an alehouse keeper suppressed in pursuance of it, cannot be afterwards licensed again but in open sessions.

Salk. 45.

Stat. 11. And it is further enacted by the said statute of 5 and 6 Edw. 6. c. 25. s. 1. 6 and 26 Geo. 2. c. 31. " That
 " none shall be admitted or suffered to keep any common
 " alehouse or tippling-house, except in fairs, but such as shall
 " be allowed in the open sessions, or by two justices of peace,
 " whereof one to be of the *quorum*. (1)

(1) The clause excepting fairs, in the several acts, arises from the necessity of the thing, respecting the accommodation of persons resorting thither. But those who shall brew such ale or beer to be sold by them in fairs, must take care to give notice to the gaugers that the same may be surveyed; for though they are exempted from taking licence, they must nevertheless pay the duties of excise. And this indulgence seemeth to be intended only in the place where the common fair is held; and not in any private house, which may be within the limits of the town where such fair shall be kept, especially where there are licensed ale-houses sufficient. 1 Burn. 25.

† *Stat.*

† *Stat.* 12. But it is recited by 2 Geo. 2. c. 28. §. 11. That many inconveniences have arisen from persons being licensed to keep inns and common alehouses (1) by justices of the peace, who living remote from the places of abode of such persons, may not be truly informed as to the occasion or want of such inns or common alehouses or the characters of the persons applying for licence to keep the same; it is therefore enacted by the 26 Geo. 2. c. 31. §. 4. "That
 " no licences for the purposes aforesaid, shall be granted but
 " on the first day of September yearly, or within twenty
 " days after; and that such licence shall be made for one year
 " only to commence on the twenty-ninth day of the said
 " September; and that the day and place for granting such
 " licences shall be appointed by two or more of the justices
 " acting for the division (2) (where the person to be licensed
 " dwells) by a warrant under their hands and seals at least ten
 " days before such meeting, directed to the high constable or
 " high constables of the said division requiring him or them
 " to order his or their respective petty constables or other
 " peace officers to give notice to the several innkeepers and
 " alehouse keepers within their respective constablewicks of
 " the day and place of such meeting; and all licences here-
 " after granted at any other time or place shall be null and
 " void to all intents and purposes whatsoever.—But by *sect.*
 " 16. this act shall not extend to alter the time or times
 " of granting such licences for keeping of common inns or
 " ale-houses in any city or town-corporate. (3)

The manner
and time of
granting li-
cences.

12 Mod. 254.
2 Sess. Ca. 183.
Andrews 81.

For the penal-
ties of writing
licences without
being legally
stamped. Vide
1 Ann st. 2. c.
22. §. 6. 9 Ann
c. 23. 6 Geo.
1. c. 21. §. 56.
29 Geo. 2. c. 12.
§. 20.

(1) Houses for the accommodation of persons who resort to the several watering places in the kingdom, where their respective owners, their guests lodge, board, dress their victuals, supply them with ale, beer and other liquors and entertain their horses at 8 d. a day, but sell to no other persons are not inns nor ale-houses within this act.

(2) But it is not necessary to set forth specially in the licence that it was granted at a general meeting of the justices holden for the division; and therefore a conviction for keeping an ale-house without such licence, is not good upon the evidence of the licence only but there must be other evidence. 2 Sess. Ca. 183. Andrews 81.

(3) In cities and towns-corporate such certificate is supposed not to be necessary by reason of the propinquity of the persons to be licensed. 1 Burr. 27.

† *Sect.* 13. And it is also enacted by the said statute,
 " That upon granting licences by justices of the peace to any
 " person to keep an alehouse, inn, victualling house, or to
 " sell ale, beer, and other liquors by retail, every such person
 " shall enter into a recognizance to the king in the sum of 10 l.
 " with two sufficient sureties each in the sum of 5 l. or one
 " sufficient surety in the sum of 10 l. under the usual condi-
 " tion for maintenance of good order and rule within the
 " same; and in case the person applying for such licence shall
 " be hindered through sickness or infirmity or any other rea-
 " sonable cause to be allowed by the said justices, to attend in
 " person

Justices autho-
rized to grant li-
cences upon the
party entering
into a recogni-
zance.

“ person at the meeting of the same justices for granting the
 “ said licences that it shall be lawful for them to grant
 “ such licence upon two sufficient sureties entering into such
 “ recognizance each in the penalty of 10*l.* for performance
 “ of the condition of the said recognizance. (4)

(4) The court of King's Bench has no power to review the reasons upon which justices of the peace form their judgments in granting licences, by *way of appeal from such judgments or over-ruling the discretion intrusted to them*. But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion and have consequently abused the trust reposed in them; they are liable to prosecution by indictment or information or even possibly by action if the malice be very gross and injurious. But, if their judgment be wrong, and their heart and intentions be pure, God forbid, that *they should be punished*. Lord Mansfield. Burrow 556. But on the contrary, if justices have acted from bad motives and *mala fide*, in granting licences, the circumstance of their being intrusted with an absolute discretion forms the strongest case for the interposition of the court. Burrows 1716. 1-36. A *mandamus* therefore will not lie to compel the justices to grant a licence. 1 Barnard K. B. 402. 1 Burrows 556. But the court, on affidavits importing a charge of corruption will call upon them to shew the reasons whereby they guided their discretions and will grant a rule to shew cause why they should not grant the licence, and if they do not shew sufficient cause the court will grant information. And for instances of granting and refusing informations. Vide Strange 381. Burrows 653. 1317.

(5) The justices may suppress by order, without either information or conviction or shewing cause. For conviction is only necessary where the penalty is proceeded for, which ought to be by *seire facias*. Ld. Raymond 1303. 1404. Vide Strange 631. contra.

Sec. 14. And it is farther enacted, by 5 and 6 Edw. 6. c. 25. s. 3. “ That the justices of peace of every shire, city, borough, &c. may at their quarter-sessions by presentment, information, or otherwise by their discretion, inquire of all such persons as shall be allowed to keep any ale-house or tippling-house, and that be bound by recognizance, as is above said, if any of them have done any act whereby they have forfeited the same recognizance: And the said justices shall upon every such presentment or information, award process against every such person so presented or complained upon before them, to shew why he should not forfeit his recognizance, and may also hear and determine the same by all such ways and means, as by their discretion shall be thought good.” (5)

Justices may take away licences unless cause be shewn that the conditions of the recognizance have been fulfilled.

(6) If the justice convicts without a summons he is liable to an information for the misdemeanor. Strange 678. L. Ray. 1307. Self. Cases 353. L. Ray. 1303. L. Ray. 1405.

† Sec. 15. And it is further enacted by 26 Geo. 2. c. 31. s. 7. “ That any justice of the peace of any county, riding, city, liberty, or town-corporate wherein such licence shall be granted, upon complaint or information that such licensed person hath done or committed any act, offence or misdemeanor, whereby in the judgment of the same justice such recognizance may be forfeited, or the condition thereof broken may by summons (6) under his hand and seal require such person so complained of, or informed against to appear at the next general or quarter-sessions of the peace for the said county, riding, city, liberty or town-corporate then and there to answer to the matter of such complaint or information; and also may bind the person or persons who shall make such complaint or information or any other person or persons in a recognizance to appear at such general or quarter-session and give evidence against such person so complained

“ complained of or informed against ; and the justices of the
 “ peace in their general or quarter sessions shall have power to
 “ direct the jury which shall attend at such sessions for the
 “ trial of traverses or some other jury of twelve honest and
 “ substantial men to be then and there impannelled by the
 “ sheriff, without fee or reward, to inquire of the misde-
 “ meanor charged in the said complaint or information ; and
 “ if such jury shall find that the person so complained of or in-
 “ formed against hath done any act whereby the condition of
 “ his recognizance is broken, such act being specified in such
 “ complaint or information, it shall be lawful for the court of
 “ session to adjudge such person guilty of the breach of such
 “ recognizance (7) which verdict and adjudication shall be
 “ final to all intents and purposes, and thereupon the said jus-
 “ tices shall order the recognizance entered into by such of-
 “ fender to be estreated into the court of exchequer to be le-
 “ vied for his majesty’s use ; and that the said person the con-
 “ dition of whose recognizance shall be so adjudged to be
 “ broken and forfeited, shall from and after such adjudica-
 “ tion be utterly disabled to sell any ale, beer, cyder, perry,
 “ spirituous liquors or strong waters for the space of three
 “ years, and any licence granted to such person during such
 “ term shall be void and of none effect—But the justices may
 “ adjourn the hearing and trial to the then next general or
 “ quarter-sessions where the same shall be finally determined.”

(7) There are two modes of suppressing a licensed ale-house : First, by proceeding on a breach of the condition of the recognizance ; (but the party having another trade or being a bailiff can be no cause in such case.) Secondly, by indictment, and then there must be such disorders proved, as will amount to a nuisance. Salk. 45. for, except for disorder, the justices cannot suppress a licensed ale-house. Salk. 471. But where an ale-house is suppressed by indictment as a common nuisance ; it is as to the person, not the house, for that may be licensed to a better man. Hutt 100.

† “ And by par. 11. If any person shall be disabled by con-
 “ viction to sell ale, beer, cyder or perry ; he shall by the
 “ same conviction be disabled to sell any spirituous liquors,
 “ any licence before obtained for that purpose notwithstand-
 “ ing, and every licence granted to him for selling ale, beer,
 “ cyder, perry or spirituous liquors shall be void, and if he
 “ shall sell during such disability he shall be punished, or for
 “ selling without licence, and a certificate from the clerk of
 “ the peace (which he shall grant without fee) of such convic-
 “ tion shall be legal evidence.”

Stat. 16. And it is farther enacted, by 5 and 6 Edw. 6.
 c. 25. s. 4. “ That if any person, other than such as shall be
 “ allowed by the said justices, shall obstinately, and upon his
 “ own authority, take upon him to keep a common ale-
 “ house, or tippling-house, or shall contrary to the com-
 “ mandment

“mandment of the said justices, or two of them, use commonly selling of ale and beer, except in fairs; that then the said justices, or two of them, whereof one to be of the *quorum*, shall for every such offence commit every such person so offending, to the common gaol within the said shire, city, borough, &c. there to remain without bail or mainprize by the space of three days; and before his deliverance the said justices shall take his recognizance with two sureties, That he shall not keep any common alehouse, tippling-house, or use commonly selling of ale or beer, as by the discretion of the said justices shall seem convenient.”

The exciseman's book to be proof of a person being an alehouse-keeper.

† *Stat. 17.* And it is farther enacted by 26 Geo. 2. c. 31. §. 9. “That where any justice of the peace shall suspect that any alehouse-keeper, victualler, or retailer, sells ale, beer, cyder, or perry, without such licence, it shall and may be lawful for such justice to call such suspected person before him, and also any excise-officer or gauger to produce before such justice his stock book, or other account which such officer keeps, of the charge or survey of such suspected person in respect of any of the liquors aforesaid; and likewise to examine such excise-officer or gauger upon oath touching the manner in which such officer surveys or charges such suspected person in respect of any liquors aforesaid, or how or in what manner such suspected person actually pays the duties for any of the said liquors; and if it shall appear by such stock book or other account, or by the examination of the said officer or gauger, that such person so suspected of selling any of the liquors aforesaid, is surveyed as a victualler or retailer, and is charged with the same duties that victuallers and retailers are usually charged with, and pay for any of the liquors aforesaid, and is not intitled to the allowance or abatement given to common brewers, then and in such case such suspected person shall be deemed an alehouse-keeper, victualler, retailer, or seller of any of the liquors aforesaid, to all intents and purposes, as if the same had been proved by two witnesses.”

Justices may examine persons suspected not to be licensed.

† *Stat. 18.* And it is farther enacted, par. 10. “That if any person shall make information before any one justice, and shew probable cause that he suspects that any person sells ale, beer, or other liquors, without a licence from two justices, it shall be lawful for such justice to call such suspected person before him, and also to summon any other person as evidence, to prove the charge against such suspected person; and if such person so summoned shall refuse to appear, or when appearing shall refuse to be examined upon oath, and give evidence as aforesaid, such person or persons

" persons shall forfeit the sum of 10*l.* to be levied by distress, &c. for the use of the poor where the offender shall live." (8)

(8) The justices may suppress an unlicensed alehouse at discretion, for on the denial of a licence no appeal lies. And on the commitment of the owner of such unlicensed house, the want of a licence can only come in question, and not the reason why it was denied. Salk. 46.

Stat. 19. And it is farther enacted, by 3 Car. 1. c. 3. *8 Modern 175. Strange 555. Sect. Caf. 264.*
 " That if any person shall upon his own authority, not being
 " thereunto lawfully licensed, take upon him to keep a common alehouse or tippling-house, or use commonly selling of
 " ale, or beer, cyder, or perry, except in fairs, every such
 " person shall for every such offence forfeit twenty shillings
 " to the use of the poor of the parish where such offence shall
 " be committed; the same offence being viewed by any
 " mayor, bailiff, or justice of peace, or other head officer
 " within the several limits, or confessed by the party so offending, or proved by the oath of two witnesses, to be
 " taken before any mayor, bailiff, or other head officer, or
 " any justice of peace, being within the limits of their commission." (9)

(9) The remainder of this section which was recited in the former edition, prescribed the form in which the penalty should be levied, but as this part seems to be virtually repealed by 5 Geo. 3. c. 46. which prescribes the amount and

the manner of levying the penalties for this offence, I have omitted to insert it. Vide *infra*, sect. 39. page 464.

† *Sect. 20.* And it is farther enacted by 26 Geo. 2. c. 31.
 f. 4. " That the said recognizance, with the condition thereof,
 " fairly written or printed, shall forthwith, or at the next
 " general or quarter sessions of the peace at farthest, after
 " granting such licences, be sent or returned to the clerks of
 " the peace, or persons acting as such, for every county,
 " riding, city, liberty, or town-corporate in *England*, wherein
 " such licences shall be granted, under the hands of the justices of peace, before whom such recognizances were taken,
 " to be by the said clerks of the peace, or such other person
 " acting as such, duly entered or filed amongst the records
 " of the sessions of the peace; and for every such licence
 " granted without taking such recognizance; and for every
 " such recognizance taken, and not sent or returned as
 " aforesaid, every justice of the peace signing such licence,
 " shall forfeit 3*l.* 6*s.* 8*d.* and by sect. 6. the forfeiture for
 " granting licences without taking recognizances, shall be
 " together with costs to him who shall sue."

The clerk of the peace to return the recognizances to the sessions.

† *Sect. 21.* And it is also further enacted, by par. 5.
 " That the clerks of the peace shall keep a register or calendar of all the recognizances so sent or returned, and shall
 " deliver to the justices at their general meetings in September, every year, for granting licences in each division,
 " or place, a true copy of such register or calendar; and

Of which they shall deliver an account to the justices at their yearly meetings.

" that

“ that for every recognizance there shall be paid to the justices clerk, taking such recognizances to the clerk of the peace, as a fee for recording, and for making and delivering copies as aforesaid, one shilling, and no more, by the person licensed, over and above the fees payable to the said justices clerks.”

Conviction of unlicensed persons to be returned, &c.

† *Stat.* 22. And it is further enacted by par. 13. “ That every conviction of any offender for selling ale, beer, or other liquors without such licence, or after being disabled to sell as aforesaid, shall be certified by the justice of peace making the same, to the next general or quarter sessions to be filed and entered among the records of the said session: and there shall be added that the same is the first, second or third conviction.—Provided always, that the offender who shall be punished by virtue of this act, shall not be punished for the same offence by virtue of any former act, and *à converso*. Nor shall this act extend to the two universities.”

The manner of obtaining a licence for a house not licensed before.

1 Burr. 557, 558.

† *Stat.* 23. And it is further enacted by the above-mentioned statute 26 Geo. 2. c. 31. par. 2. for the better preventing disorders in alehouses, “ That no licence shall be granted to any person (except in cities and towns corporate, s. 16.) not licensed the year preceding, unless such person produce at the general meeting of the justices in September, a certificate under the hands of the parson, vicar, or curate, and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders and inhabitants of the parish or place where such alehouse is to be, setting forth that such person is of good fame, and of sober life and conversation; and it shall be mentioned in such licence that such certificate was produced, otherwise such licence shall be null and void.” (10)

(10) In cities and towns corporate such certificate is supposed not to be necessary, by reason of the propinquity of the person to be licensed. 1 Burr 27. Yet it is discretionary in the justices whom they will license, and a mandamus will not lie to compel the justices, because the reason why it was denied reside with themselves. Str. 881.

How in cases of death the licences may be made good.

(11) By 29 Geo. 2. c. 12. s. 23. the necessity of this certificate is dispensed with in the representatives of the party dying.

† *Stat.* 24. And it is further enacted by said statute, par. 3. “ That if any licensed person shall die, or remove from an alehouse; it shall be lawful for the person succeeding to such house, to keep on the said alehouse during the residue of the term of such licence, on condition that within thirty days after such death or removal, such person obtain such certificate as aforesaid, (11) to be signed by some neighbouring justice, in order to its being produced at the next general meeting in September; and if such certificate be
“ not

“ not so obtained and signed within the said thirty days, then
 “ immediately from and after the expiration thereof, such
 “ licence shall be null and void; and no licence shall entitle
 “ any person to keep an alehouse in any other place than
 “ that in which it was first kept by virtue of such licence;
 “ and such licence with regard to all other places, shall be
 “ null and void.”

Vide infra,
 sect. 35.

† *Stat.* 25. And it is further enacted by 26 Geo. 2. c. 13.
 f. 11. “ That no justice of the peace being a common brewer
 “ of ale or beer, innkeeper or distiller, or a seller of or dealer
 “ in ale or spirituous liquors, or interested in any of the said
 “ trades, or being a victualler or malster, shall be capable,
 “ or have any power to grant licences for selling ale or beer,
 “ or any other liquors, but the same shall be void.”

No justice who
 deals in malt
 or spirituous
 liquors, shall
 interfere in
 granting licen-
 ces.

† *Stat.* 26. And by 4 Jac. 1. c. 4. “ If any person shall
 “ sell or deliver any beer or ale to any person that shall then
 “ sell beer or ale, as a common tippler, or alehouse keeper,
 “ the same person not having a licence to sell ale or beer,
 “ (except it be for the use of his household only); he shall
 “ forfeit for every barrel 6 s. 8 d. and so proportionally for
 “ other quantities; half to the poor, and half to him that
 “ shall sue in sessions by action of debt, information, in-
 “ dictment, or presentment.

Forfeiture for
 selling in an un-
 licenced house.

† *Stat.* 27. It is enacted by 2 Geo. 2. c. 28. sect. 10.
 “ That no person or persons whatsoever shall sell brandy or
 “ other distilled liquors by retail, to be drunk in his, her, or
 “ their house or houses, but such persons only as shall be
 “ thereunto licensed, in the same manner, and liable to the
 “ same laws, as common alehouse keepers.”

Sellers of spiri-
 tuous liquors to
 be licensed in the
 same manner as
 alehouse keepers.

† *Stat.* 28. And by the 10 Geo. 2. c. 17. sect. 10, 11.
 “ No person or persons shall be enabled to sell made wines, to
 “ be drunk in his, her, or their house or houses, unless first
 “ licensed by two justices of the county, or place where the
 “ same are sold; and no such licence shall be granted but to
 “ persons who shall keep publick victualling houses, inns,
 “ coffeehouses, or alehouses.”

Seller of wines
 also must be li-
 censed.
 For the stamp-
 duties on wine
 licences, vide
 9 Anne, c. 23.
 — 30. Geo. 2.
 c. 19. and
 31 Geo. 2. c. 31.
 f. 7.

† *Stat.* 29. And it is further enacted by 16 Geo. 2. c. 8.
 sect. 8. “ That no person shall presume to retail any brandy,
 “ rum, arrack, usquebaugh, geneva, aquavitæ, or any other di-
 “ stilled spirituous liquors, or strong waters mixed or unmix-
 “ ed, by whatever name they may be called, publickly or pri-
 “ vately, without first taking out a licence (12) for that purpose,
 “ within ten days at least before they shall retail the same, and
 “ for which they shall pay 20 s. : which licence, if taken out
 “ within the bills of mortality, shall be under the hands and
 “ seals of two of the commissioners of excise, &c. But if

Sellers of strong
 waters, &c. must
 be licensed.
 (12) Vide 1 Burn
 32. for an obser-
 vation on the
 double licence
 required for re-
 tailing malt li-
 quors and spi-
 ritous liquors,
 and the attempt
 made by the ex-
 cise office to

“ taken

Keep their jurisdiction distinct from the justices.

By 2 Geo. 2. c. 28. s. 10. Justices of the peace and other officers shall have the same jurisdiction over such retailers of spirituous liquors as they have over alehouse keepers.

Sellers of less than two gallons to be deemed retailers. Vide 11 Geo. 2. c. 26. s. 1. where clandestine sellers are deemed retailers. And 9 Geo. 2. c. 23. s. 16. where giving liquors to servants, or apprentices fetching goods from shops, is deemed retailing. Vide also sect. 11. respecting paying wages in spirituous liquors.

To what kind of public-housekeepers licences shall be only granted.

Punishment on persons selling distilled liquors without licence.

“ taken out without the limits aforesaid, then such licence shall be executed under the hands and seals of the several collectors and supervisors of excise within their respective districts; and a fresh licence shall be taken out ten days at the least before the expiration of the twelve months after the taking out of the first licence, and in the same manner to renew such licence from year, to year on pain of 10 l. or two months hard labour, until paid, on conviction by one justice. And by 24 Geo. 2. c. 40. sect. 11. and 26 Geo. 2. c. 13. sect. 8. it shall in no case be mitigated below 5 l.— And by 29 Geo. 2. c. 12. sect. 22. such person shall be first licensed to sell ale or spirituous liquors, by two or more justices of the peace.”—

† Sect. 30. And by 17 Geo. 2. c. 17. sect. 22. “ Every person who shall retail spirituous liquors mixed or unmixed, to be drank in any quantity whatsoever, in any place to him belonging, or shall retail, or send the same abroad in less than two gallons, shall be deemed a retailer.—And by sect. 19. no such licence shall be granted, except to such persons only who keep taverns, victualling houses, inns, coffeehouses, or alehouses; and all other licences shall be void; and if any licensed person shall exercise the trade of a distiller, grocer, or chandler, or keep a brandy shop for sale of spirituous liquors, the licence shall be void.”

† Sect. 31. And by 24 Geo. 2. c. 40. sect. 12. and 26 Geo. 2. c. 13. sect. 9. “ No licence shall be granted within the limits of the head office of excise in London, but to such as occupy tenements of 10 l. a-year, and pay parish rates for the same, or in places where the occupiers of houses are not rated to the church and poor, then to such persons as pay rent of 12 l. a-year, and not otherwise, nor to persons in any other part of the kingdom but such as pay to the church and poor: and no licence shall be of any avail longer than he shall be so qualified.”

† Sect. 32. And by 24 Geo. 2. c. 40. sect. 13. and 9 Geo. 3. c. 6. “ All the distilled liquors that shall be then, or at any time within six months after conviction of such unlicensed person, found in the custody, house, or other place occupied therewith, whether it be in his own occupation or not, shall, by warrant of the said commissioners, or of one justice, be seized and staved, or otherwise destroyed. And if any person shall offend again in like manner, the commissioners, or justices before whom he shall be convicted of such subsequent offences, may inflict the penalties by
“ any

“ any former law to be inflicted for such offence, and also
 “ commit the offender to the house of correction, not ex-
 “ ceeding three months.”

† *Seet.* 33. And by 24 Geo. 2. c. 40. sect. 41. “ The
 “ commissioners, or one justice on oath of any offence against
 “ this act, or any other act, for retailing of spirituous liquors,
 “ may grant a warrant to any of the peace officers, or other
 “ parish officers, to enter and search the houses and other
 “ places where the offence shall be sworn to have been com-
 “ mitted, or in the occupation of the persons sworn to be
 “ guilty thereof, and they may break open the doors if not
 “ opened on demand, and seize all such distilled spirituous li-
 “ quors as they shall there find, and detain the same till the
 “ offence shall be heard and determined; and if the offender
 “ be convicted, the liquors shall be forthwith staved; and if
 “ he be not convicted, the same shall be restored.”

Officers by war-
 rant may break
 open doors, &c.

† *Seet.* 34. And whereas the aforesaid penalty of 10 l. is
 sometimes insufficient to deter offenders, it is therefore enacted
 by 13 Geo. 3. c. 56. “ That whoever, for himself, or by
 “ any other person for his benefit, shall presume to retail any
 “ distilled spirituous liquors, or strong waters, without first
 “ taking out a licence for that purpose, in the manner before
 “ prescribed and directed, shall forfeit 50 l. for each offence,
 “ to be sued for, levied, recovered, and mitigated by any law
 “ of excise now in force, or by action of debt or information
 “ at Westminster, half to the king, half to the prosecutor:
 “ but this penalty shall not either by the commissioners or
 “ justices be reduced below 5 l.”

The penalty of
 retailing distil-
 led liquors with-
 out a licence,
 increased.

† *Seet.* 35. And it is further enacted by 29 Geo. 2. c. 12.
 sect. 32. “ That if any persons so licensed to sell ale, beer, or
 “ other exciseable liquors, shall die or remove from the ale-
 “ house, or other place wherein such ale, beer, or other li-
 “ quors, shall, by virtue of such licence, be sold, it shall and
 “ may be lawful for the executors, administrators, and assigns
 “ of such person so dying or removing, who shall be possessed
 “ of such house or place, or the occupier thereof, to sell ale,
 “ beer, or other liquors therein, during the residue of the
 “ term for which such licence shall have been granted to the
 “ person so dying or removing, without any certificate from
 “ any justice of the peace, or any new licence to be had and
 “ obtained in that behalf, any thing in 26 Geo. 2. or any
 “ other law to the contrary notwithstanding.”

The representa-
 tives of a publi-
 can may use the
 unexpired term
 of the licence,
 without the cer-
 tificate required
 by 26 Geo. 2.
 c. 32. Vide
 ante sect. 24.

† *Seet.* 36. And it is further enacted by said statute, sect.
 24. “ That in case any alehouse in England shall become
 “ empty or unoccupied after the general day appointed for li-
 “ censing, (the occupier whereof was duly licensed the year
 “ preceding)

How houses
 which become
 empty may be
 licensed.

“ preceding) it shall be lawful for any two of his majesty’s
 “ justices of peace at a petty sessions to grant a new licence
 “ to any new tenant or occupier to open such house, as an
 “ alehouse, or victualling house, and to sell ale there till the
 “ next general licensing day, so as the said licence be stamped
 “ as directed by the act: such new tenant or occupier obtain-
 “ ing such certificate as is directed and prescribed by 26 Geo.
 “ 2. c. 31. But this act not to extend to licences granted
 “ by commissioners of excise.”

Prison keepers
 selling liquors
 deemed ale-
 house keepers.

† *Seet.* 37. And by sect. 26. “ Every person who shall re-
 “ tail ale, beer, or other liquors, in any prison, or house of
 “ correction, or workhouse, shall be deemed keepers of com-
 “ mon alehouses and tippling houses, unless they shall obtain
 “ a licence according to law.”

Sellers of spiri-
 tuous liquors
 must have ale
 licences also.

† *Seet.* 38. And by 29 Geo. 2. c. 29. sect. 22. “ Neither
 “ the commissioners of excise, or any of the collectors or su-
 “ pervisors, or any other officers appointed to deliver licences
 “ to the retailers of any spirituous liquors or strong waters,
 “ shall grant or deliver any such licence to any person who
 “ shall not produce a licence, granted to him by justices of
 “ the peace to sell ale, beer, and other exciseable liquors,
 “ and stamped according to 9 Anne, c. 23.”

All the former
 penalties upon
 persons selling
 liquors without
 licence for that
 purpose, made
 uniform.

† *Seet.* 39. And whereas by the laws now in force, per-
 sons selling ale or beer, or other exciseable liquors by retail,
 without licence, are liable and subject by different laws to
 different penalties and punishments, which has occasioned
 much confusion, and an ill and improper use has been made
 thereof in many instances: for the prevention thereof it is
 enacted by 5 Geo. 3. c. 46. sect. 22. “ That every person
 “ lawfully convicted of selling ale or beer, or other exciseable
 “ liquors by retail, without being duly licensed so to do, shall,
 “ for every such offence, forfeit and undergo the several pe-
 “ nalties and punishments herein after mentioned, and pro-
 “ vided in that behalf, instead and in lieu of the several pe-
 “ cuniary and corporal punishments which they are now liable
 “ or subject to by any law now in force; that is to say, for the
 “ first offence the sum of 40 s. and also the costs and expence
 “ of convicting such offender; and in case such sum, together
 “ with the charges and expences of convicting such offender,
 “ shall not be paid within the space of fourteen days next
 “ after such conviction, that then the offender shall suffer im-
 “ prisonment for one month, unless the said penalty, and the
 “ costs, charges, and expences of such conviction shall be
 “ sooner paid; for the second offence 4 l. &c. and, if not paid
 “ within a week, two months imprisonment; and for the
 “ third, and every other offence, the sum of 6 l. &c. and, if
 “ not

“ not paid in three days, three months imprisonment. All
 “ which said costs and expences shall be assessed, settled, and
 “ ascertained by the justice or justices of the peace before
 “ whom such offenders shall respectively be convicted; and all
 “ the penalties, forfeitures, &c. shall go, half to the king,
 “ and the other half to the informer; together with all such
 “ costs, charges, and expences, to be assessed or ascertained
 “ as aforesaid.”

† *Secl. 40.* And it is farther enacted by 5 Geo. 3. c. 46.
secl. 23. “ That it shall be lawful for any one or more justice
 “ or justices of the peace of the county or place, to hear
 “ and determine the same offences in a summary way; which
 “ said justice or justices of the peace are hereby authorised and
 “ required, upon any information exhibited, or complaint
 “ made in that behalf, to or before him or them, to summon
 “ the party or parties accused, and also the witnesses on ei-
 “ ther side, (if they shall be required to summon any such
 “ witnesses) and upon the appearance or contempt of the
 “ party or parties accused, by not appearing, to proceed to
 “ examine and hear the matter in a summary way; and al-
 “ so to examine such witnesses on oath as shall be produced
 “ therein, and to give his or their judgment thereon; and in
 “ case he or they shall convict the party or parties so accused,
 “ or complained against, of the offence laid to his, her, or
 “ their charge, and such party or parties shall refuse or ne-
 “ glect to pay the penalty or penalties, for which he, she, or
 “ they stand convicted, within the time herein before men-
 “ tioned for that purpose, together with the costs of such con-
 “ viction or convictions, to be assessed, settled, and ascertain-
 “ ed as aforesaid; that then it shall be lawful for every such
 “ justice and justices to issue a warrant under their hands and
 “ seals, for the apprehending and committing to prison any
 “ such offender, for such time, and in such manner, as the
 “ nature of the offence shall require, according to the true
 “ intent and meaning of this act.”

Justices may
 hear and deter-
 mine the of-
 fence.

N. B. The
 number of wit-
 nesses necessary
 toward the con-
 viction is not
 here mentioned,
 and therefore
 this seemeth to
 rest as it was be-
 fore, on the sta-
 tute of 3 Car. 1.
 c. 3. which di-
 recteth the con-
 viction to be on
 confession of the
 offender, or
 oath of two wit-
 nesses. 1 Burn
 24.

† *Secl. 41.* And it is further enacted, par. 24. “ That
 “ whoever shall be summoned as a witness before such justice
 “ touching the matters aforesaid, either on the part of the
 “ prosecution, or the party accused, and shall neglect or re-
 “ fuse to appear at the time and place to be for that purpose
 “ appointed, without a reasonable excuse to be allowed of by
 “ such justice; or appearing shall refuse to be examined on
 “ oath and give evidence before such justice, shall forfeit
 “ twenty shillings, to be levied and paid in such manner, and
 “ by such means as are herein before directed as to other
 “ penalties.”

Penalty on wit-
 nesses not obey-
 ing summons.

N. B. This pe-
 nalty is but
 small, and might
 defeat the inten-
 tion of the act;
 for by the wit-
 nesses paying 20s.
 the offender may
 chance to escape
 the payment of
 2, 4 or 6l. be-
 sides charges.
 But there is a
 penalty of 20l.

clause in the statute of 26 Geo. 2. c. 31. which imposes on the like offence a
 † Burn 24.

How persons aggrieved may appeal.

N. B. There seems to be a mistake in setting forth that the costs shall be expressed in the warrant of distress; for no power of distress is given: The meaning seems to have been that the same shall be expressed in the conviction; as specified in the form prescribed by the act. 1 Burn 25. But by 9 Geo. 3. c. 6. this act shall not extend to alter any acts made since the 3 Geo. 2. c. 13. relating to the selling of spirituous liquors by retail without licence.

Salkeld 45.

Publicans are not to encourage tippling in their houses.

4 Jac. 1. 5.

(a) 21 Jac. 1. 7.

† *Stat.* 42. But by par. 25. "Persons aggrieved by the conviction or judgment of any justice or justices of the peace, for any of the offences aforesaid, and shall give security to the satisfaction of such justice, &c. for payment of penalty, costs and expences, to be expressed in the warrant of distress on such conviction, may appeal to the next quarter sessions, unless the same be held within six days or less next after such conviction; and in that case to the justices assembled at the next sessions after such sessions, and not afterwards: and the judgment of such sessions shall be final and conclusive. And if such appeal be frivolous and vexatious, the party grieved by the same shall have costs, &c. not exceeding 5*l*."

Stat. 43. Also it is enacted by 1 Jac. 1. c. 9. and 4 Jac. 1. c. 15. and 21 Jac. 1. c. 7. and 1 Car. 1. c. 4. "That if any inn-keeper, victualler, or alehouse-keeper, or any keeper of a tavern, or one who sells wine in his house, and also keeps an inn, or victualling in his house, do permit or suffer any person, whether such person be an inhabitant of the place where such inn, &c. shall be, or not to continue drinking or tippling in any inn or victualling-house, &c. other than such as shall be invited by any traveller, and shall accompany him only during his necessary abode there; and other than labouring and handicraftsmen in cities, and towns-corporate, and market towns upon the usual working days, for one hour at dinner-time, to take their diet in an alehouse; and other than labourers and workmen, who for the following of their work by the day, or by the great, in any city, town-corporate, market-town, or village, shall for the time of their said continuing in work there, to journey, lodge, or victual in any inn, alehouse, or other victualling-house; or other than for urgent and necessary occasions, to be allowed by two justices of peace, That then every such inn-keeper, &c. shall forfeit ten shillings to the use of the poor of the parish where such offence shall be committed; the same offence being viewed and seen by any mayor, bailiff, or justice of the peace within their several limits, or found by verdict on a trial upon an indictment at assizes, sessions, or court-leet, or proved by the oath of (a) one witness to be taken before any mayor or bailiff, &c. or any one justice of the peace, or by the voluntary confession of any offender, after which confession the oath of such offender shall be taken, and be a sufficient proof against any other offending at the same time."

Stat.

Stat. 44. And it is farther enacted by the said statute of 1 Jac. 1. c. 9. par. 3. "That the said penalty of ten shillings shall be levied by the constables or church-wardens of the parishes where the offence shall be committed, by way of distress, and for default of satisfaction within six days, the same to be presently appraised and sold, and the surplusage to be delivered to the party of whom the distress was taken, and for want of sufficient distress the party offending to be by the said mayor, &c. committed to the common gaol, there to remain till the said penalty be paid. And if the said constables or church-wardens do neglect their duty in levying the said penalties, or in default of distress do neglect to certify the same within twenty days to the said mayor, &c. every person so offending shall forfeit forty shillings, to the use of the poor of the parish where such offence shall be committed, to be levied by distress of goods, by warrant from any one justice of peace, &c. to be taken and detained six days; within which, if payment be not made, the same goods to be appraised and sold, &c."

How the penalty for so doing is to be levied.

Stat. 45. But it is provided by the said statute of 1 Jac. 1. c. 9. "That the punishment of such as shall offend against the same, within either of the two universities, or the precincts or liberties of the same, shall be done upon the offenders, and justice ministered in this behalf; according to the intent of the said law, by the governors, magistrates, justices of the peace, or other principal officers of either of the said universities, to whom in other cases the administration of justice, and correction and punishment of offenders by the laws of this realm and their several charters doth belong; and that no other within their liberties, for any matter concerning the said law contrary to their several charters, do intermeddle, and that all penalties to be forfeited by virtue of the said act, within either of the universities or the liberties or precincts of the same, shall be levied by the officers or ministers of either of the said universities, to be from time to time in that behalf appointed by the vice-chancellors thereof for the time being respectively, and that all powers and authorities given by the said act, shall by the governors, magistrates, and principal officers aforesaid, of either of the said universities, be duly executed within either of the said universities, &c."

How this offence may be punished in the universities.

Stat. 46. And it is farther enacted by 4 Jac. 1. c. 5. and 21 Jac. 1. c. 7. "That whoever shall be drunk, and within (a) six months after such offence shall be convicted thereof either on an indictment at assizes or sessions, or court-leet, or before any (b) justices of peace in any county, or any justice of peace, or other head officer in any city or town-
H h 2

The punishment of drunkards.

(a) 4 Jac. 1. c. 1. 5 par. 11.

(b) 21 Jac. 1. 7. 4 Jac. 1. 5.

"corporate,

(a) Par. 6.

“ corporate, upon view or confession or by oath of one witness, shall forfeit 5s. to be paid within one week after conviction, to the church-wardens of the parish where the offence shall be committed, &c. and if such person shall refuse or neglect to pay the said forfeiture, the same shall be levied of his goods by warrant or precept from the said court, or judge before whom the same conviction shall be: and if the offender be not able to pay the said sum of 5s. he shall be committed to the stocks for every offence, there to remain six hours; and if he shall be convicted a second time of the like offence, he shall be bound to the (a) good behaviour, with two sureties in a recognizance of 10l. And if any constable or other inferior officer of the place where the offence shall be committed, &c. do neglect the due correction of the said offender, or the due levying of the said penalties, he shall forfeit 10s. to the use of the poor, &c. to be levied by way of distress, by warrant from any mayor, &c.”

The punishment
of repeated tip-
pling—

(b) 1 Ca. 1. 4.

(c) 21 Jac. 1. 7.

Supra Sect. 17.

(d) 4 Jac. 1. 5.
Par. 11.

Supra Sect. 20.

Sect. 47. And it is farther enacted by the said statute of 4 Jac. 1. c. 5. and 21 Jac. 1. c. 7. and 1 Car. 1. c. 4. That if any person shall remain or continue drinking or tippling in any inn, victualling-house, alchouse or (b) tavern, &c. whether he be an (c) inhabitant of the place at the time of such drinking or not; and the same be viewed by any mayor, or other head-officer or justice of peace, or confessed by the offender, or proved by one witness in the manner prescribed for the above mentioned offence of suffering tippling in public houses, unless it be in such cases as are excepted in the above mentioned act, relating to the said offence of suffering tippling, &c. Every person so offending, and being convicted within six months, shall forfeit 3s. and 4d. to the use of the poor of the parish where the offence shall be committed, to be levied by way of distress in such manner as the above mentioned forfeitures for drunkenness are to be levied: And if any such offender be not able to pay the said forfeiture, any mayor, head officer, justice of peace, or court where any such conviction shall be, may set him in the stocks for four hours.”

Officers to be
charged on oath
to prevent such
offences.

Sect. 48. And it is farther enacted by the said statute of 4 Jac. 1. c. 5. s. 7. “ That all constables, church-wardens, headboroughs, tithingmen, aleconners and sidemen shall in their several oaths incident to their several offices, be charged in like sort to prevent the offences contrary to the said statute.”

Ecclesiastical
jurisdiction.

Sect. 49. But it is provided by the same statute, par. 8. “ That nothing therein contained shall in any wise abridge
“ the

“ the ecclesiastical jurisdiction.” And it is farther provided, par. 9. “ That no offender, who hath once been punished for his offence against any article of the said act, by any the ways or means before limited, shall be afterwards punished for the same offence by any other ways or means.”

Only one punishment.

§ 50. And it is farther provided, par. 10. “ That nothing in the said act contained shall be prejudicial to either of the universities, but that the chancellor, master, and scholars, &c. may as fully use and enjoy all their jurisdictions, rights, privileges, and charters, as before the said statute they had or might have done; any thing in the said act to the contrary notwithstanding.”

Not to prejudice the rights of the universities.

§ 51. And it is enacted by 7 Jac. 1. c. 10. “ That if any person being an alehouse-keeper, shall be lawfully convicted for any offence committed against any of the branches of either of the said acts of 1 Jac. 1. c. 9. or 4 Jac. 1. c. 5. he shall for the space of three years next ensuing the said conviction, be utterly disabled to keep any such alehouse.”

Additional punishment.

Vide Ld. Raym. 1303. 1403.

† § 52. It is also enacted by 30 Geo. 2. c. 24. s. 14. “ That if any person or persons licensed to sell any sorts of liquors, or who shall sell or suffer the same to be sold in his, her, or their house, or houses, or in any out-houses, ground, or apartments thereto belonging, shall knowingly suffer any gaming with cards, dice, draughts, shuffle board, mifflin, or billiard tables, skittles, nine pins or with any other implement of gaming by any journeymen, labourers, servants or apprentices; on conviction by confession, or on the oath of one witness, before any justice of the county or place within six days after the offence committed, he shall forfeit 40s. and for every like offence afterwards 10l. to be levied by warrant of distress, and three fourths thereof paid to the poor and the other fourth to the party on whose information the offender shall be convicted.”

Publicans not to suffer gambling by servants in their houses on penalty of 10l.

† § 53. And it is further enacted, “ That if any such persons shall so game as aforesaid, and complaint thereof shall be made on oath to a justice of the place, he may issue his warrant to a constable to apprehend and carry such offender before a justice of the county, and on conviction as aforesaid, he shall forfeit from five to twenty shillings, or be committed to hard labour.”

And the parties who so game are liable to pay from 5 to 20

CHAPTER THE SEVENTY-NINTH.

OF MONOPOLIES.

FOR the better understanding the nature of the offence of procuring or making use of a monopoly, I shall consider : First, What shall be said to be a monopoly : Secondly, In what manner the procuring, or making use thereof, are restrained by the common law : Thirdly, In what manner by statute.

3 Inst. 181.
 Nov. 182.
 4 B. C. 159.

SECT. 1. As to the first point, it seemeth that a monopoly an allowance by the king, to any person or persons, of the sole buying, selling, making, working, or using of any thing, whereby any person is sought to be restrained from any freedom which he had before, or hindered from his lawful trade. (1)

(1) Monopoly and ingrossing differ only in this, that the first is by patent from the king, the other by act of the subject between party and party, but are both equally injurious to trade and the freedom of the subject, and therefore are equally restrained by the common law. Skinner 169.

As to the second point it seemeth, That the procuring or making use of such monopolies, is restrained by the common law two ways. First, By declaring all grants of this kind to be void. Secondly, By making those who procure or make use of, them liable to be fined.

3 Mod. 132.
 127. 76.
 11 Co. 87.
 1 Roll. 4.
 2 Roll. 174.
 Godb. 254.
 2 Inst. 63. 47.
 10 Mod. 131.
 See Skinner
 132 to 137.
 164 to 173.
 197 to 204.
 223 to 220. East India Com. v. Sandys.

SECT. 2. And first it is said, That all grants of this kind relating to any known trade are made void by the common law, as being against the freedom of trade, and discouraging labour and industry, and restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniencies to the publick. (2)

(2) The king, and none but the king, Skinner 224. by his charter, may constitute fraternities for the management of foreign and domestic trade. 8 Co. 125. who may make by laws in restraint, if they be for the regulation of trade." See Comm. Dig. by-law, b. 3. c. 3. Trade B. D. 1. D. 4. 10 Mod. 139.

(a) 2 R. Abr. 214. 3 Inst. 182. 2 Inst. 61. *SECT. 3.* And upon this ground it hath been (a) resolved That the king's grant to any particular corporation of the sole importation,

importation of any merchandize is void, whether such merchandize be prohibited by statute or not. (3)

(3) Hence also it seems, that the king's charter, empowering particular persons to trade to and from such a place is void, so far as it gives such persons an exclusive right of trading and debarring all others: and it seems now agreed that nothing can exclude a subject from trade but an act of parliament. Ray. 489. Chan. Ca. 165. Vernon 127. Skinner 165. 3 Mod. 126. 3 Bacon 627. c. 3. Trade 4.

Sec. 4. And for the like reasons also it hath been resolved, (a) 2 R. Abr. 214. That the grant of the sole (a) ingrossing of wills and inventories in a spiritual court, or of the sole (b) making of bills, pleas and writs in a court of law, to any particular person, is void. (b) 1 Jones 231. 2 R. Abr. 214. 3 Mod. 75. Vern. 120. 10 Mod. 107. 131. 133.

Sec. 5. Also it hath been adjudged, That the king's grant of the sole making, importing, and selling of (c) playing cards, is void, notwithstanding the pretence that the playing with them is a matter merely of pleasure and recreation, and often much abused, and therefore proper to be restrained; for since the playing with them is in itself lawful and innocent, and the making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than by any other employment. (c) 11 Co. 84. 85. &c. Mod. 671. Noy 173. &c. 2 Inst. 47. Vide 2 Atkins 484.

Sec. 6. But it seemeth clear, That the king may, for a reasonable time, make a good grant to any one of the sole use of any art invented or first brought into the realm by the grantee, as shall be shewn more at large in the 14th, 15th, and 16th sections of this chapter. Also it seems to be the better opinion, That the king may grant to particular persons the sole use of some particular employments, (as of printing the holy scriptures and law books, (4) &c.) whereof an unrestrained liberty might be of dangerous consequence. Noy 182, 183. 1 Mod. 256. 3 Keb. 792. 3 Mod. 75.

(4) The reasons given are, that the invention of printing was new; that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, and none could make proclamations but the king. And as to law books, that the king has the making of judges, sergeants, and officers of law; and that law books are printed in a particular language and character, &c. 3 Bac. Abr. 627. in nota. 2 Ch. Ca. 67. Skinner 234. (1 Burn Es. l. 47. Basket's Case). 1 Vernon 120. 275. Carth. 90. Carter 89. 1 Mod. 256. 3 Cio. 227. 10 Mod. 107.

Sec. 7. Secondly, Also it is holden, That the procuring or making use of an unlawful monopoly is farther restrained by the common law, by subjecting those who are guilty thereof to a fine and imprisonment for the offence, as being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom. And it is said, That there are precedents of prosecutions of this kind in former days; but I cannot find any modern instances thereof. 3 Inst. 181. 2 Inst. 47. 61.

Señ. 8. As to the third point, viz. In what manner the procuring and making use of a monopoly are restrained by statute, it is declared and enacted by 21 Jac. 1. c. 3. "That all monopolies, and all commissions, grants, licences, charters and letters patents to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of any thing within this realm, or Wales, or of any other monopolies, and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters whatsoever any way tending to the instituting, strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void, and of none effect, and in nowise to be put in ure or execution."

Señ. 9. And it is farther enacted, par. 2. "That all persons, bodies politick and corporate whatsoever, shall be disabled and incapable to have, use, exercise, or put in ure any monopoly, or any such commission, grant, or licence, &c. or other thing tending as aforesaid, or any liberty, power, or faculty, grounded or pretended to be grounded upon them, or any of them."

Señ. 10. And it is farther declared and enacted, par. 3. "That all monopolies, and all such commissions, grants, and licences, &c. and all other things tending as aforesaid, and the force and validity of them, ought to be, and shall be examined, heard, tried, and determined, by and according to the common laws of this realm, and not otherwise."

3 Inst. 182,
183.
2 Atk. 484.

Señ. 11. In the construction of this clause it hath been holden, That all matters of this kind ought to be tried in the courts of common law only, and not at the council table, or in the court of Chancery, or any other court of like nature. (5)

(5) Chancery will never establish a right claimed under a charter of the Crown, till there has been an action at law to try the right. 2 Atk. 484.—But it is the highest point of the Lord Chancellor's jurisdiction to cancel the king's letters patent under the Great Seal. 4 Inst. 83. And where a patent is granted to the prejudice of the subject, the king of right is to permit him upon his petition to use his name for the repeal of it in a *scire facias* at the king's suit. 3 Levinz. 221. Dyer 197. 8 Coke, Prince's Case. 11 Coke 74. 2 Ventris 344. 6 Mod. 229. But questions concerning the effect and extent of letters patent can only be tried in the king's courts. Co. v. p. 173.

Señ. 12. And it is farther enacted, par. 4. "That if any person shall be hindered, grieved, disturbed, or disquieted, or his goods or chattels any way seized, attached, distrained, taken, carried away, or detained, by occasion or pretext of any monopoly, or of any such commission, grant
" or

“ of licence, &c. or other matter or thing tending as afore-
 “ said, and will sue to be relieved in any of the premises, he
 “ shall have his remedy for the same at the common law, by
 “ action grounded on the said statute, to be heard and deter-
 “ mined in the King’s Bench, Common Pleas, or Exche-
 “ quer, against the party by whom he shall be so hindered or
 “ grieved, &c. or by whom his goods shall be so seized or at-
 “ tached, &c. wherein every such person, which shall be so
 “ hindered or grieved, &c. or whose goods shall be so seized
 “ or attached, &c. shall recover three times so much as the
 “ damages which he sustained by means of such hindrance,
 “ &c. and double costs; and in such suits, or for the staying
 “ or delaying thereof, no essoin, protection, wager of law,
 “ aid, prayer, privilege, injunction, or order of restraint, shall
 “ be in anywise prayed granted, admitted, or allowed, nor
 “ any more than one imparlance: and if any person shall,
 “ after notice that the action depending is grounded upon the
 “ said statute, cause or procure any action at the common
 “ law grounded thereon, to be stayed or delayed before judg-
 “ ment, by colour or means of any order, warrant, power,
 “ or authority, save only of the court wherein such action
 “ shall be depending, or after judgment shall cause or pro-
 “ cure the execution to be stayed or delayed, by colour or
 “ means of any order, warrant, power or authority, save on-
 “ ly by writ of error or attain, that then the said person or
 “ persons so offending shall incur a præmunire.”

Sec. 13. It is said, That the first branch of this last clause 3 Inst. 135.
 relating to the delaying of causes of this kind before judgment,
 not only extendeth to the Privy Council, Chancery, Exche-
 quer Chamber, and the like, but also to those who shall pro-
 cure any warrant from the king for such purpose; and it is
 said, That the latter branch relating to the delaying of execu-
 tion after judgment extendeth even to the judges of the court
 where the cause is depending.

Sec. 14. But it is provided, par. 6. “ That no declara-
 “ tion in the statute mentioned shall extend to any letters pa-
 “ tents and grants of privilege for the term of fourteen years,
 “ or under, of the sole working or making of any manner of
 “ new manufactures within this realm,” (under which words 3a k. 447.
 manufactures newly brought into the realm from beyond sea
 are included, though they were not new there) “ to the true
 “ and first inventor and inventors of such manufactures,
 “ which others, at the time of making such letters patents
 “ and grants, shall not use, so as also they be not contrary
 “ to the law, nor mischievous to the state, by raising prices
 “ of commodities at home, or hurt of trade, or generally in-
 “ convenient; the said fourteen years to be accounted from

“ the date of the first letters patents, or grant of such privilege, but that the same shall be of such force as they should
 “ be, if the said act had never been made, and of none
 “ other.”

3 Inst. 184.

Sec. 15. It hath been resolved, That no new invention concerning the working of any manufacture is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one.

3 Inst. 184.
 10 Mod. 181.

(8) Vide Ark.
 Wright's case.

Sec. 16. Also it hath been holden, That a new invention to do as much work in a day by an engine, as formerly used to employ many hands, is not within the said exception, because it is inconvenient in turning so many labouring men to idleness. (6)

3 Inst. 184.
 10 Mod. 185.

Sec. 17. Also it seemeth clear, that no old manufacture in use before can be prohibited in any grant of the sole use of any such new invention.

Sec. 18. And it is farther provided, par. 7. “ That nothing in the said act contained shall extend to any grant or privilege, power, or authority whatsoever before the said act, made, granted, allowed, or confirmed by any act of parliament, so long as the same shall continue in force.”

Sec. 19. And it is farther provided, par. 9. “ That nothing in the said act contained shall be in anywise prejudicial to any city, borough, or town corporate within this realm, concerning any grants, charters, or letters patents to them made, or concerning any custom used by or within them, or unto any corporations, companies, or fellowships of any art, trade, occupation, or mystery, or to any companies or societies of merchants within this realm, erected for the maintenance, enlargement, or ordering of any trade or merchandize: but that the same charters, customs, corporations, &c. and their liberties and immunities shall be of such force and effect as they were before the making of the said act, and of none other, any thing before in the said act contained to the contrary in anywise notwithstanding.”

Sec. 20. And it is farther provided, par. 10. “ That nothing in the said act contained shall extend to any letters patents, or grants of privilege, concerning printing; nor to any commission, grants, or letters patents, concerning the digging, making, or compounding of saltpetre, or
 “ gunpowder,

“gunpowder, or the casting or making of ordnance, or shot
 “for ordnance; nor to any grant or letters patents of any
 “office erected before the making of the said statute, and
 “then in being, and put in execution, other than such of-
 “fices as had been decreed by proclamation: but that all
 “such grants, &c. shall be of the like force and effect, and
 “no other, as if the said act had never been made.”

Stat. 21. But it is enacted by 16 Car. 1. c. 21. “That
 “it shall be lawful for all persons, as well strangers as natu-
 “ral born subjects, to import any quantities of gunpowder
 “whatsoever, paying such customs and duties for the same
 “as by parliament shall be limited: and that it shall be
 “lawful for all his majesty’s subjects of this his realm of
 “England, to make and sell any quantities of gunpowder at
 “his pleasure, and also to bring into this kingdom any quan-
 “tities of saltpetre, brimstone, or any other materials for the
 “making of gunpowder: and that if any person shall put in
 “execution any letters patents, proclamation, edict, act, or-
 “der, warrant, restraint, or other inhibition whatsoever,
 “whereby the importation of gunpowder, saltpetre, brim-
 “stone, or other the materials afore mentioned, shall be
 “anywise prohibited or restrained, he shall incur a præmu-
 “nure.”

1 Jac. 1. c. 8.
 5 Geo. 1. c. 26.
 11 Geo. 1. c. 23.
 4 Geo. 2. c. 29.
 15 Geo. 2. c. 32.
 27 Geo. 2. c. 38.
 29 Geo. 2. c. 26.

Stat. 22. And it is farther provided by the said statute of
 21 Jac. 1. c. 3. s. 11, 12. “That nothing in the said act
 “contained shall extend to any commission or grant con-
 “cerning the digging, compounding, or making of allum,
 “or allum mines, &c. nor concerning the licensing of the
 “keeping of any tavern or selling of wines, to be spent in
 “the mansion-house, or other place, in the tenure or occu-
 “pation of the party selling the same; and a farther provi-
 “sion is made in the latter part of the statute, for some par-
 “ticular grants to particular corporations and persons, as
 “Newcastle upon Tyne, &c.”

Stat. 23. But it is said, That the said clause relating to
 allum was needless, because all such mines belong of course
 to the persons in whose grounds they are, and therefore no pri-
 vilege concerning them can be granted but in the king’s own
 ground.

† *Stat. 24.* And for the encouragement of learned men to
 compose and write useful books, and to prevent their being
 ruined by the piracy of bookfellers, it is enacted by 8 Ann.
 c. 19. “That the author of any book or books, and his
 “assignee or assigns, shall have the sole right and liberty of
 “printing and reprinting such book or books for the term of
 “fourteen

1 In. 185.
 Vide the case of
 Mason v. Mar-
 ray for publish-
 ing Gray’s
 Poems.

N. B. A musical composition is a writing within this statute.

Rach v. Longman. Cowper 623. But it is said that charts are not within this statute.

per *Ld. Mansfield, Sayer's case. Brown 85.* An abridgment of any literary performance which ingeniously preserves the whole sense

of the work, and thereby renders it a more useful production, is held to possess original merit, and does not trench upon the property of its first author. *Loft 775.* So also it is said that there may be originality in casting an index, or pointing out a ready method of finding a place in a map. *2 Brown's Chancery Rep. p. 84.* And *qu.* if a man makes a new survey of roads from actual measurement.

Wilde 15 Geo. 3. c. 54. s. 6.

“fourteen years, to commence from the day of first publishing the same, and no longer; and if any other person whatsoever, within the time granted by this act, shall print, reprint, or import, any such book without the consent of the proprietor first obtained in writing, signed in the preface of two or more credible witnesses, or shall knowingly sell, publish, or expose to sale, any such book or books, without consent as aforesaid, the offender shall forfeit every sheet of the same to the proprietor, who shall forthwith damask or destroy the same, and also forfeit one penny for every sheet found in the custody of such offender; half to the king, and half to the prosecutor who will sue for the same in any of the courts at *Westminster*.”

† *Stat. 25.* And it is further enacted, par. 2. “That this act shall not extend to any book or books printed without such consent, unless the title to the copy of the whole of such book or books, and every volume thereof, shall before publication be entered in the register book of the company of Stationers, in such manner as hath been usual, which register book shall at all times be kept in the hall of the said company, and unless such consent of the proprietor be in like manner entered as aforesaid, for every of which several entries, six-pence shall be paid and no more; which register may be resorted to, and inspected without fee or reward; and the clerk of the said company shall give a certificate under his hand of such entry, for which he shall receive six-pence. And it is further enacted, That if the clerk of the said company refuse in the presence of two witnesses to make such entry and grant such certificate, he shall forfeit 20*l.* to the proprietor, who in such case, notice being first duly given of such refusal, by an advertisement in the *Gazette*, shall have the like benefit as if such entry and certificate had been duly made and given.”

† *Stat. 26.* And it is provided by par. 5. enforced by the 15 *Geo. 3. c. 54. s. 6.* “That nine copies of the whole of each book or books, and every volume thereof, upon the best paper, that shall be printed, published, or reprinted and published with additions, shall by the printer thereof, be actually delivered to the warehouse-keeper of the said company of Stationers,

“ Stationers, at the hall, before publication, for the use of the libraries of the several universities, &c. on pain of forfeiting besides the value of the said printed copies, the sum of five pounds, for every copy not so delivered, as also the value of the said printed copy not so delivered, and if not delivered by the said warehouse-keeper to the universities accordingly within ten days after demand, the offender shall forfeit 5*l*. &c. But this act shall not prohibit the importation of foreign books. Action to be brought in three months, defendants may plead the general issue.”

By 12 Geo. 2. c. 36. continued by 22 Geo. 3. c. 13. 1. 4. whoever shall import or sell books first written and printed in this kingdom and reprinted abroad, shall forfeit 5*l*. and double the value of the books. But this act shall

not extend to books containing any extracts from English authors, &c. Vide also 27 Geo. 2. c. 28.

† *Stat.* 27. And it is further provided by the said statute, par. 11. “ That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.” (7)

The contingent interest of authors.

(7) In the case of *Millar v. Taylor*, it was insisted, “ That there is a *real* property remaining in authors, or in their assigns, after the publication of their works, independent of and not taken away or circumscribed by the above statute. No question perhaps ever underwent a more learned or elaborate discussion; or created on its several points, a greater diversity in the opinions of the Judges. It was held by Lord Mansfield, Aiton and Willes contra Yates, that authors and those claiming under them, possess as a common law right, not interrupted by the statute, a perpetuity in their works after publication. And the same doctrine was confirmed by decree in Chancery, in the case of *Becket v. Donaldson*. But on appeal to the House of Lords this decree was reversed, and the doctrine now established is that the common law right of authors and their assigns is interrupted by 8 Ann. c. 19. that they have not the sole and exclusive copy right in perpetuity, after having published their compositions, but that they have it for fourteen years from the publication, and after the expiration of that term, the right parted with, returns to the authors, if living, or to their assigns, for another fourteen years.” 5 Com. Dig. 570. 4 Burrow from 2303. to 2417. But if the author assigns by general words “ all his interest, &c.” in the copy right, he conveys not only his absolute interest for the first fourteen years, but his contingent interest also of the other fourteen years, which result to him, if living, upon the expiration of the first term. *Carnan v. Bowles*, in Chancery, Trin. 26 Geo. 3. Vide also *Rennet v. Thompson*, in the Exchequer.

† *Stat.* 28. And it is also enacted by 8 Geo. 2. c. 13. Engraving.
“ That every person who shall invent and design, engrave, etch, or work in mezzotinto, or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched or worked in mezzotinto or chiaro oscuro, any historical or other print, shall have the sole right of printing and reprinting the same, for the term of fourteen years, to commence from the day of the first (1) publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print; and if any person, within the time limited by this act, shall engrave, etch, or work as aforesaid, or in any other manner copy or sell, or cause to be engraved, etched or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale any such print or parts

(1) To secure the property under this act, the proprietor must engrave both his name and the day of first publishing the print, on the plate and print the same on the print. *Sayer qui tam v. Dacey*, 3 Willm 60.

“ parts thereof, without the consent of the proprietor first
 “ had in writing, signed by him in the presence of two wit-
 “ nesses; or shall knowingly publish, sell, or expose to sale,
 “ or otherwise in any manner dispose of the same, &c. &c.
 “ such offender shall forfeit the plate and every impression
 “ thereof, and also five shillings for every print found in his
 “ custody, or sold or exposed to sale by him, half to the king,
 “ half to the prosecutor, if sued in three months. But this
 “ act shall not extend to the purchaser of plates.”—And by
 17 Geo. 3. c. 57. proprietors of prints may bring action on
 the case, and recover damages and double costs against per-
 sons copying their prints, in the whole or in part by vary-
 ing, adding, or diminishing without consent.

† *Stat.* 29. And by 15 Geo. 3. c. 53. “ The universities
 “ in *England* and *Scotland*, and the colleges of *Eaton*, *West-*
 “ *minster*, and *Winchester* respectively, shall have for ever the
 “ sole liberty of printing and reprinting, but it must be at
 “ their own printing press, all such books as shall at any
 “ time heretofore have been, (or having not been heretofore
 “ published or assigned) shall at any time hereafter be be-
 “ queathed or otherwise given by the author or authors of the
 “ same respectively, or the representatives of such author or
 “ authors to or in trust for the said universities or colleges,
 “ or to or in trust for any college or house of learning within
 “ the same, unless the same have been or shall be given for
 “ any term of years or other limited term. And whoever
 “ shall print or sell the same contrary to this act shall, pro-
 “ vided the books be entered within two months after the
 “ bequest, in the manner the act directs, forfeit the same,
 “ and also one penny for every sheet, one half to the king,
 “ the other to the prosecutor. But the universities may sell
 “ copy right in like manner as any author.”

CHAPTER THE EIGHTIETH.

OF FORESTALLING, INGROSSING, AND REGRATING, AND OTHER OFFENCES OF THE LIKE NATURE.

FOR the better understanding the nature of *Forestalling*,
Ingrossing and *Regrating*, and other such like offences,
 I shall consider, How such offences are treated by the com-
 mon law. And how by statute.

As to the first point, I shall consider: What is esteemed an offence of this kind by the common law. And how such offence is punishable by the common law.

Sec. 1. As to the first of these particulars it is said, That all endeavours whatsoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false (a) rumors or by (b) buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same (c) market, or by any other such like devices, are highly criminal at common law, and that all such offences antiently came under the general notion of forestalling, which included all kinds of offences of this nature.

(a) 43 Aff. 12.
3 Inst. 195, 196.
B. Indictment,
40.
Presentment 18.
(b) Crim. 18.
(c) Crim. 20.

Sec. 2. And surely there can be no attempt of this kind, but must be looked upon as a high offence against the publick, inasmuch as it so apparently tends to put a check upon trade to the general inconvenience of the people, by putting it out of their power to supply themselves with a commodity, without an unreasonable expence, which often proves extremely oppressive to the poorer sort, and cannot but give just cause of complaint to the richest.

Sec. 3. But it hath been resolved, That any merchant, whether he be a subject or a foreigner, bringing victuals, or any other merchandize into the realm, may sell the same in gross, but that no person can lawfully buy within the realm any merchandize in gross, and sell the same in gross again, because by such means the price will be enhanced, for the more hands any merchandize passeth through, the dearer it must grow, because every one will make his profit of it: and if such practices were allowable, a rich man might ingross into his hands a whole commodity, and then sell it at what price he should think fit; which is of such dangerous consequence, that the bare ingrossing of a whole commodity with an intent to sell it at an unreasonable price, is an offence indictable at the common law, whether any part thereof be sold by the ingrosser, or not.

3 Inst. 198.
Summary 138.

C. Car. 231,
232.

Sec. 4. And so jealous is the common law of all practices of this kind, that it will not suffer corn to be sold in the sheaf, perhaps for this reason, because by such means the market is in effect forestalled.

3 Inst. 197.
Summary 138.

Sec. 5. As to the second particular, viz. In what manner offences of this kind are punishable by the common law; it is said, That by an antient statute the offender was to be grievously amerced for the first offence; for the second, to be condemned to the pillory; for the third, to be imprisoned; and

3 Inst. 195.

for the fourth to be compelled to abjure the vill : And there seems to be no doubt, but that at this day all offenders of this kind are liable to a fine and imprisonment, answerable to the heinousness of their offence, upon an indictment at common law.

As to the second point, *viz.* In what manner these offences are treated by statute, I shall consider ; what particular provisions have been made relating to this matter.

The particular provisions of this nature are five-fold ;
 1. The obliging all victuallers to sell at a reasonable price.
 2. The allowing all foreigners free liberty of importing and selling victuals. 3. The giving the great officers of state a power to tax the price of victuals. 4. The prohibiting conspiracies to raise the price of victuals. 5. The prohibiting all forestalling, ingrossing, and regrating.

How butchers
selling unwhole-
some meat are
to be punished,
vide 1 vol. Run-
nington's sta-
tutes p. 187. c.
7. By 4 Hen.
5. c. 3. they
shall not kill
beasts in walled
towns. By 23
Hen. 8. c. 8.
they shall not kill
calves but with-
in the time pre-
scribed. By 22

Stat. 6. The first of the said provisions depends upon 23 Edw. 3. c. 6. by which it is enacted, " That butchers, fishmongers, regrators, hostlers, brewers, bakers, poulterers, and other sellers of all manner of victual; shall be bound to sell the same for a reasonable price, having respect to the price that such victual shall be sold at in the places adjoining; so that such sellers have moderate gains, reasonably to be required, according to the distance of the place from whence the said victuals be carried; on pain to forfeit double the value, &c. And the chief officers of towns are required to see this statute executed, on pain of paying the treble value of the thing sold, &c."

Hen. 8. c. 6. they are prohibited from keeping tan-houses. By 1 Jac. 1. c. 22. they are not to kill calves under five weeks old. By 5 Ann c. 34. s. 2. they are not to sell cattle to one another in London. By 7 Ann c. 6. may sell dead calves or sheep.

Stat. 7. The second of the above-mentioned provisions depends upon 6 Rich. 2. c. 10. and 11 Rich. 2. c. 7. and 1 Hen. 4. c. 17. by which it is enacted, " That all manner of aliens, being of the amity of the king, coming into any town of the realm with fish, or other victual, shall be under the king's especial protection, and may cut their fishes and victuals in pieces, and in part, or in all, at retail, or in gross, as to them best shall seem, to sell and make their profit, &c."

And it is farther enacted by 14 Hen. 6. c. 6. " That if any man disturb any alien to sell his fish in gross, or at retail, in part or in whole, contrary to the above mentioned ordinances, and thereof be duly attainted at the suit of the king, or of the party, he shall forfeit 10 l. &c."

Stat.

Stat. 8. The third of the above mentioned provisions depends upon 25 Hen. 8. c. 2. by which it is enacted, "That to remedy the frequent rise of the price of cheese, butter, capons, hens, chickens, and other necessary victuals for man's sustenance, by ingrossing and regrating the same; the Lord Chancellor and other high officers of state, &c. may, upon complaint of any inhausing of the prices of such victuals without ground or reasonable cause, in any part of the king's dominions, set and tax reasonable prices of such victuals: And that after proclamation made of such prices, all farmers, owners, broggers, and all other victuallers whatsoever, having or keeping any such victuals to the intent to sell shall the same to such of the king's subjects as will buy them at such prices as shall be taxed by such proclamation, under the pains to be limited in the said proclamation."

Vide also 24 Hen. 8. c. 3. 25 Hen. 8. c. 1. 27 Hen. 8. c. 9. which enjoin that butchers meat shall be sold by the pound, &c. But by 13 Hen. 8. c. 11. it may be sold by weight or otherwise.

Stat. 9. But it is provided, "That the officers of cities, boroughs, or towns-corporate, and all other persons having authority to set prices of such victuals, may set such prices in such manner as if the said act had not been made."

Stat. 10. The fourth of the above mentioned provisions depends upon 2 and 3 Edw. 6. c. 15. by which it is enacted, "That if any butchers, brewers, bakers, poulterers, cooks, coster-mongers or fruiterers, shall conspire, covenant, promise, or make any oaths, that they shall not sell their victuals but at certain prices; or if any artificers, workmen or labourers, do conspire, covenant, or promise together, or make any oaths, that they shall not make or do their works, but at a certain price or rate; or shall not enterprize, or take upon them to finish what another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times; every such person so conspiring, &c. shall forfeit for the first offence 10 l. and if he pay not the same within 6 days, shall suffer 20 days imprisonment; and for the second offence shall forfeit 20 l. &c. and for the third, 40 l. &c. And if any such conspiracy, covenant, or promise be made by any society, brother-hood, or company, of any craft, mystery or occupation of the victuallers above mentioned, with the presence or consent of the more part of them, that then immediately upon such act of conspiracy, &c. over and besides the particular punishment before appointed, their corporation shall be dissolved; and that the said offences shall be determined at the assizes, sessions of the peace, or court-lect."

Vide 5 Eliz. c. 4.

† But by 2 Geo. 3. c. 14. "No brewer, innkeeper, victualler or other retailer of strong beer or ale shall be
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“sued impleaded or molested by indictment, information, popular action or otherwise, for advancing the price of strong beer or ale in a reasonable degree. And it is also enacted that if any brewer, innkeeper, victualler or retailer of beer or ale shall mix or cause, or suffer to be mixed in any vessel, tub, measure, or otherwise, any strong beer, ale or strong worts with any small beer or small worts or with water after the gauge of such strong beer, ale, or strong worts shall have been taken by an officer of excise he shall forfeit fifty pounds.”

† *Sec. 11.* The fifth of the above mentioned provisions, viz. the prohibiting all forestalling, ingrossing and regrating, depended chiefly upon 3 and 4 Edw. 6. c. 21. 5 and 6 Edw. 6. c. 14. altered by 5 Eliz. c. 5. s. 13. 5 Eliz. c. 12. and 13 Eliz. c. 25. s. 31. But it is recited by 12 Geo. 3. c. 71. “That it has been found by experience that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle and sundry other sorts of victuals by preventing a free trade in the said commodities, have a tendency to discourage the growth and to enhance the price of the same, which statutes if put in execution would bring a great distress upon the inhabitants of many parts of this kingdom and in particular upon those of the cities of London and Westminster, and thereupon it is enacted that the 3 and 4 Edw. 6. c. 21.—The 5 and 6 Edw. 6. c. 14.—The 2 and 3 Philip and Mary, c. 3.—The 5 Eliz. c. 5. and c. 12.—The 15 Car. 2. c. 8. and so much of 5 Ann c. 34. as relates to butchers selling cattle alive or dead, within London and Westminster and within 10 miles thereof, and also all acts for the better inforcement of the same, being detrimental to the supply of the labouring and manufacturing poor of this kingdom shall be and the same are hereby declared to be repealed.”

2 Burn's Jurf.
vice 231.

† *Sec. 12.* But as the statute 5 and 6 Edw. 6. c. 14. particularly describes the several offences of forestalling, ingrossing, and regrating, which still continue offences at common law, it may be of use to recite it, notwithstanding it is repealed; as it contains a parliamentary description of those offences.

An indictment
on this clause
must charge ex-
actly that the
goods bought
were coming to
the market to be
sold.
1 Rolle's Rep.
431.

† *Sec. 13.* For it is enacted by par. 1. of the said statute, “That whosoever shall buy or cause to be bought, any merchandize, victual, or any other thing whatsoever coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek, or road of this realm or Wales, from any parts beyond the sea to be sold, or make any bargain contract or promise for
“the

“ the having or buying of the same, or any part thereof so
 “ coming as is aforesaid before the same shall be in the mar-
 “ ket, fair, city, or port, &c. ready to be sold, or shall make
 “ any motion by word, letter, message or otherwise to any
 “ person or persons for the enhancing of the price or dearer
 “ selling of any thing above mentioned, or else dissuade,
 “ move, or stir any one coming to the market or fair, to ab-
 “ stain or forbear to bring or convey any of the things above
 “ rehearsed to any market, city, or port, &c. to be sold shall
 “ be deemed.—A FORESTALLER.”

† Sect. 14. And it is enacted by par. 2. “ That whofo- Vide Owen 135.
 “ ever shall by any means regrate, obtain, or get into his
 “ hands or possession in any fair or market, any corn, wine,
 “ fish, butter, cheese, candles, tallow, sheep, lambs, calves,
 “ swine, pigs, geese, capons, hens, chickens, pigeons, co-
 “ nies or other dead victual whatsoever, that shall be brought
 “ to any fair or market to be sold, and do sell the same again
 “ in any fair or market holden in the same place or within 4
 “ miles thereof shall be taken for—A REGRATOR.”

† Sect. 15. And by par. 3. “ Whosoever shall ingross or
 “ get into his hands by buying, contracting or promise taking,
 “ other than by demise, grant, or lease of land, or tithes,
 “ any corn growing in the fields or any other corn or grain,
 “ butter, cheese, fish, or other dead victual whatsoever,
 “ within the realm of England to the intent to sell the same
 “ again shall be reputed—AN UNLAWFUL INGROSSER.”

Sect. 16. In the construction of the last mentioned clauses
 the following opinions have been holden. I. That (a) salt is (a) Inst. 195.
 Sum. 152.
 Cro. Car. 231.
 a victual within the meaning of it, not only because it is of
 necessity of itself for the food and health of man, but also be-
 cause it seasoneth and maketh wholesome beef, pork, and
 other victuals, in which respect it seemeth itself to come under
 the notion of victual, and seemeth to be so understood by the
 makers of 13 Eliz. 12. c. 25. as appears from par. 21. of
 that statute.

Sect. 17. II. That (b) such victual only as is necessary for (b) 3 Inst. 195.
 Sum. 152.
 Cro. Car. 231.
 Owen 135.
 Cro. Jac. 214.
 the food of man is within the purview of it; and therefore
 that apples, and cherries, and such like fruits, are not within
 the intent of it; for the words are, corn, or grain, butter,
 cheese, fish, or other dead victuals, which words are said to
 import the same as if it had been said, or other dead victuals
 of like quality: Also it is said, That there is not any thing
 prohibited within the statute, but what hath a proviso, how
 in some kind it might be brought; and therefore since
 there is not any such prov. so for apples, that they never were
 intended

(a) C. Car. 231. intended to be restrained : And agreeably hereto it hath been
 (b) 3 Inst. 196. holden, That neither (a) hops nor (b) malt are within the
 Sum. 152. meaning of the statute.
 Con. Owen 135.
 1 Roll 12.

Sec. 18. III. That the buying of corn, with an intent to
 (c) Bridg. 5, 6. make (c) starch of it, and then to sell it, is not within the said
 Owen 135. clause, because it is not bought to be sold again in the same
 (d) Moore 595. nature in which it was bought, but to be first altered by a
 Cro. Car. 231. trade or science, and then sold again. And for the like reason
 Con. Owen 135. it seemeth to be the better (d) opinion, That the buying of
 (e) C. Car. 231. corn in order to make meal of it, and then to sell it, is no
 3 Inst. 196. way within the said clause ; and that the buying of (e) barley
 See c. 33. s. 13, with an intent to make it into malt, and then to sell it, had no
 13. need of the exception made for it in the said statute.
 Con. Owen 135.

Sec. 19. IV. That there is no necessity in an information
 or indictment grounded on the said clause for ingrossing any
 (f) 1 Jon. 157. victual therein mentioned, to say (f) That the defendant did
 not come by it by a demise of land, &c. but that the defen-
 dant, if he have any such matter to alledge in his defence,
 may give it in evidence.

Sec. 20. V. That in every such information, &c. the
 2 Leon. 35. words of the statute must be precisely pursued, and therefore
 that it is not sufficient to say, That the defendant bought so
 much corn, &c. because the words are, " shall ingross, or get
 " into his hands, by buying, &c."

Sec. 21. And it is farther enacted by the said statute of
 5 and 6 Edw. 6. c. 14. par. 4, 5, 6. " That whoever shall
 " offend in any of the things before recited, and be thereof
 " duly convicted, shall for the first offence suffer imprison-
 " ment for two months, and forfeit the value of the goods so
 " by him bought or had; and for the second offence shall suf-
 " fer imprisonment for one half year, and forfeit the double
 " value of the goods, &c. and for the third offence shall be
 " set on the pillory, and forfeit all his goods, and be commit-
 " ted to prison during the king's pleasure."

Sec. 22. And from hence it seems clearly to follow, as
 2 Bull. 317. well as from the general rules of law, That no information
 Cro. Car. 181. for any of the above mentioned offences against the said sta-
 6 M. d. 32. tute, can be good, without shewing in certain the quantity of
 Vide alio Cro. the thing in relation to which the defendant is supposed to
 Car. 314. have incurred the penalty, not only because otherwise the judg-
 1 Roll. 11, 12. ment to be given on such an information can never be pleaded
 1 Jones 320. in bar of any other, because it cannot appear that both of
 them were brought for the same thing, but also because it
 cannot appear to the court what forfeiture the defendant
 ought

ought to incur, unless the extent of the offence, which is to be the measure of it, be specially set forth : And for these reasons it hath been adjudged, That an information for ingrossing corn, the quantity whereof is expressed by the word *cumulus* only, is not good ; yet it is said, That an indictment for ingrossing *magnam quantitatem frumenti*, is sufficient.

APPENDIX THE FIFTEENTH.

OF REGULATING THE PRICE OF VICTUALS, &c.

THE statutes against the offences of forestalling, ingrossing, and regrating contained particular exceptions to the general restraints which they imposed. These exceptions related to corn, butter, cheese, cattle, beer, cyder, mum, fish, wine, oil, sugar, salt, fishmongers, victuallers, butchers, poulterers, badgers, drovers, lessors, shipping and castles, and towns-corporate. Of the foregoing catalogue those exceptions which relate to fish, fishmongers, victuallers, butchers, poulterers, lessors, shipping and castles and towns-corporate are repealed. But as the intention of the legislature both in enacting and in repealing these statutes, in accommodation to the emergencies of different periods of time, was to regulate the price of victuals, and to prevent them from being exorbitantly raised upon, or improperly introduced to the public, by the respective dealers therein ; I shall endeavour to collect the several statutes which relate to the regulation under the following arrangement.

1. As to the measure of corn.
2. As to bread.
3. As to beer.
4. As to butter and cheese.
5. As to cattle and butchers.
6. As to fish.
7. As to bacon and pork.
8. As to hay and straw.
9. As to fruit.
10. As to honey and wax.
11. As to the measure of coals.

N. B. For the regulation of wood cut up for fuel vide 43 Eliz. c. 14. 9 Ann c. 15. and 10 Ann c. 6.

† *Secl.* 1. And first. As to the measure of corn. It is enacted by 22 Car. 2. c. 8. s. 2. "That whoever shall sell any sort of corn or grain, ground or unground, or any kind of salt, usually sold by the bushel, by any other, than by Winchester measure, marked in his majesty's exchequer, and sealed as the act directs, containing eight gallons to the bushel and no more or less, and the said bushel stricken even by the wood or brim of the same by the seller, shall forfeit 40s. for every offence, on conviction, before one justice, by one witness; to be levied by the church-wardens, &c. by distress and sale; and in default imprisonment till paid."

† *Secl.* 2. And by par. 3. "If any mayor or other head officer shall knowingly permit the same, on conviction at the sessions, he shall forfeit 5 l. half to the prosecutor and half to the poor by distress, or imprisonment till paid."

† *Secl.* 3. And it is further enacted, by 22 and 23 Car. 2. c. 12. "That whoever shall sell or buy any corn ground or unground or salt by the bag without measuring being thereunto required or in any other manner than as above directed and that without shaking of the said bushel or measure by the buyer, shall forfeit beside the above penalty, all the corn, grain or salt bought or sold contrary to this act, or the value thereof, to the party complaining."

N. B. Notwithstanding this statute the measure of corn differs in many places the bushel being greater in one place than another, and it is said that an ancient and uninterrupted custom, for this is good. Barlow, 578.

† *Secl.* 4. And it is further enacted, par. 3. "That the proof shall lie upon the defendant to make it appear by the oath of one witness that he sold or bought the same lawfully, or, if he fail he shall forfeit as before mentioned, and which shall be distributed by the justice, half to the poor and half to the informer." (1)

(1) For the mode by which the averaged price of corn is to be ascertained, vide 10 Geo. 3. c. 39. And for the same in London and Essex 21 Geo. 3. c. 50. For regulations respecting its importation 22 Car. 2. c. 13. 15 Car. 2. c. 7. 5 Geo. 2. c. 12. 6 Geo. 3. c. 17. 13 Geo. 3. c. 43. 16 Geo. 3. c. 39. 18 Geo. 3. c. 25. 19 Geo. 3. c. 29. For regulating its exportation, vide 1 W. and M. c. 12. 1 Geo. c. 7. 11 Geo. 2. c. 22. 13 Geo. 3. c. 43. s. 5. 14 Geo. 3. c. 64. 14 Geo. 3. c. 5. and 11 and 26. 16 Geo. 3. c. 37. 18 Geo. 3. c. 16.

General affize and price of bread.

† *Secl.* 5. Secondly. AS TO BREAD, it is enacted, by 31 Geo. 2. c. 29. par. 2. "That the court, or persons here- in authorized to set the affize and weight of bread, and the price for the same shall so do as often as they shall think proper; and that in every affize, respect shall be had, to the price which the grain, meal, or flour, shall bear in the public markets, in or near the place for which such affize shall be set; making reasonable allowance to makers for their charges and profit."

Secl.

† *Sec. 6.* And it is further enacted by par. 3. " That
 " where an affize shall be set no person shall there sell bread,
 " except wheaten and household, otherwise brown bread,
 " and such other sort as shall be publicly allowed by the court,
 " or persons aforesaid; but where it hath been usual to make
 " bread with the meal of rye, barley, oats, beans, or pease,
 " or with the meal of any such different sorts of grain mixed
 " together, or the court or persons shall allow such bread
 " to be made, such bread shall and may be there made and
 " sold; and offenders on conviction by confession, or the
 " oath of one witness, before any magistrate within his ju-
 " risdiction, shall forfeit not exceeding forty nor less than
 " twenty shillings."

An affize set, no
 other sort of
 bread (wheaten
 and household
 excepted) to be
 made for sale;
 under penalty of
 forfeiting not
 exceeding 40s.
 nor less than 20s.

† *Sec. 7.* By par. 4. " The affize and weight of the sever-
 " al sorts of bread for sale, and the price shall be set and
 " ascertained according to the following tables mark'd No. 1.
 " and 2."

Affize and price
 to be according
 to the tables.

N. B. Part the first, or the affize table contains the price
 of the bushel of wheat Winchester measure, from 2 s. 9 d. to
 14 s. 6 d. the bushel, the allowance of the magistrates or jus-
 tices to the baker, for baking being included. So that (for
 example) if the price of wheat in the market is 5 s. the
 bushel and the magistrates allow 1 s. 6 d. the bushel to the
 baker for baking, find 6 s. 6 d. and even therewith will be
 found the weights of the several loaves; but if the price in the
 market is 3 s. and the allowance 1 s. then the weight of the
 loaves will be found even with 4 s.

N. B. Part the second, or the priced table, contains the
 price of the bushel of wheat, Winchester measure from 2 s. 9 d.
 to 14 s. 6 d. the bushel the allowance for baking being includ-
 ed; and also the prices of the peck, half peck, and quartern,
 wheaten and household loaves, so that (for example) if the
 price of wheat in the market is 5 s. the bushel, and the magis-
 trates allow 1 s. 6 d. for baking, find 6 s. 6 d. and even there-
 with will be found the prices of the several loaves.

It was thought sufficient to insert the weight of a penny-
 loaf, as the weight of all other loaves may thereby be easily
 calculated.

T A B L E No. I.

OF BREAD MADE OF WHEAT.

Price of the bush- el of wheat & baking.	Weight.		Prized Bread.											
	The penny loaf.		Quarter loaf.		Halfpeck loaf.		Peck loaf.							
	Wheaten s. d.	Household oz. dr.	Wheaten s. d.	Household oz. dr.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.
2 9	22 4	29 4	0 3 $\frac{1}{4}$	0 2 $\frac{1}{2}$	0 6 $\frac{1}{4}$	0 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$
3 0	20 4	7 1	0 3 $\frac{1}{2}$	0 2 $\frac{1}{2}$	0 7	0 5	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$
3 3	18 9	25 4	0 3 $\frac{1}{2}$	0 2 $\frac{1}{2}$	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 3	0 11 $\frac{1}{2}$	1 3	0 11 $\frac{1}{2}$	1 3	0 11 $\frac{1}{2}$	1 3	0 11 $\frac{1}{2}$
3 6	17 6	23 3	0 4	0 3	0 8	0 6	1 4	0 12	1 4	0 12	1 4	0 12	1 4	0 12
3 9	16 6	21 6	0 4 $\frac{1}{4}$	0 3 $\frac{1}{2}$	0 8 $\frac{1}{4}$	0 6 $\frac{1}{4}$	1 5	0 12 $\frac{1}{4}$	1 5	0 12 $\frac{1}{4}$	1 5	0 12 $\frac{1}{4}$	1 5	0 12 $\frac{1}{4}$
4 0	15 4	20 4	0 4 $\frac{1}{2}$	0 3 $\frac{1}{2}$	0 9	0 6 $\frac{1}{2}$	1 6 $\frac{1}{2}$	0 12 $\frac{1}{2}$	1 6 $\frac{1}{2}$	0 12 $\frac{1}{2}$	1 6 $\frac{1}{2}$	0 12 $\frac{1}{2}$	1 6 $\frac{1}{2}$	0 12 $\frac{1}{2}$
4 3	14 4	19 1	0 4 $\frac{3}{4}$	0 3 $\frac{3}{4}$	0 9 $\frac{1}{2}$	0 7 $\frac{1}{2}$	1 7 $\frac{1}{2}$	0 13	1 7 $\frac{1}{2}$	0 13	1 7 $\frac{1}{2}$	0 13	1 7 $\frac{1}{2}$	0 13
4 6	13 9	17 15	0 5	0 3 $\frac{1}{2}$	0 10	0 7 $\frac{1}{2}$	1 8 $\frac{1}{2}$	0 13 $\frac{1}{2}$	1 8 $\frac{1}{2}$	0 13 $\frac{1}{2}$	1 8 $\frac{1}{2}$	0 13 $\frac{1}{2}$	1 8 $\frac{1}{2}$	0 13 $\frac{1}{2}$
4 9	12 12	17 1	0 5 $\frac{1}{2}$	0 4	0 10 $\frac{1}{2}$	0 8	1 9 $\frac{1}{2}$	0 14	1 9 $\frac{1}{2}$	0 14	1 9 $\frac{1}{2}$	0 14	1 9 $\frac{1}{2}$	0 14
5 0	12 1	16 6	0 5 $\frac{3}{4}$	0 4 $\frac{1}{4}$	0 11 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 11	0 14 $\frac{1}{2}$	1 11	0 14 $\frac{1}{2}$	1 11	0 14 $\frac{1}{2}$	1 11	0 14 $\frac{1}{2}$
5 3	11 9	15 7	0 6	0 4 $\frac{1}{2}$	1 0	0 9	2 0	0 15	2 0	0 15	2 0	0 15	2 0	0 15
5 6	11 2	14 10	0 6 $\frac{1}{4}$	0 4 $\frac{3}{4}$	1 0 $\frac{1}{4}$	0 9 $\frac{1}{4}$	2 1	0 15 $\frac{1}{4}$	2 1	0 15 $\frac{1}{4}$	2 1	0 15 $\frac{1}{4}$	2 1	0 15 $\frac{1}{4}$
5 9	10 8	14 4	0 6 $\frac{1}{2}$	0 5	1 1 $\frac{1}{4}$	0 9 $\frac{1}{2}$	2 2 $\frac{1}{4}$	0 15 $\frac{1}{2}$	2 2 $\frac{1}{4}$	0 15 $\frac{1}{2}$	2 2 $\frac{1}{4}$	0 15 $\frac{1}{2}$	2 2 $\frac{1}{4}$	0 15 $\frac{1}{2}$
6 0	10 2	13 9	0 7	0 5 $\frac{1}{4}$	1 1	0 10 $\frac{1}{4}$	2 3 $\frac{1}{4}$	0 16 $\frac{1}{4}$	2 3 $\frac{1}{4}$	0 16 $\frac{1}{4}$	2 3 $\frac{1}{4}$	0 16 $\frac{1}{4}$	2 3 $\frac{1}{4}$	0 16 $\frac{1}{4}$
6 3	9 11	13 1	0 7 $\frac{1}{4}$	0 5 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$	2 4 $\frac{1}{2}$	0 16 $\frac{1}{2}$	2 4 $\frac{1}{2}$	0 16 $\frac{1}{2}$	2 4 $\frac{1}{2}$	0 16 $\frac{1}{2}$	2 4 $\frac{1}{2}$	0 16 $\frac{1}{2}$
6 6	9 4	12 10	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 3	0 11	2 6	0 17	2 6	0 17	2 6	0 17	2 6	0 17
6 9	9 0	12 1	0 7 $\frac{3}{4}$	0 5 $\frac{3}{4}$	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7	0 17 $\frac{1}{2}$	2 7	0 17 $\frac{1}{2}$	2 7	0 17 $\frac{1}{2}$	2 7	0 17 $\frac{1}{2}$
7 0	8 11	11 9	0 8	0 6	1 4	0 12	2 8	0 18	2 8	0 18	2 8	0 18	2 8	0 18
7 3	8 7	11 2	0 8 $\frac{1}{4}$	0 6 $\frac{1}{4}$	1 4 $\frac{1}{4}$	0 12 $\frac{1}{4}$	2 9 $\frac{1}{4}$	0 18 $\frac{1}{4}$	2 9 $\frac{1}{4}$	0 18 $\frac{1}{4}$	2 9 $\frac{1}{4}$	0 18 $\frac{1}{4}$	2 9 $\frac{1}{4}$	0 18 $\frac{1}{4}$
7 6	8 3	10 11	0 8 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 5	0 13	2 10	0 19	2 10	0 19	2 10	0 19	2 10	0 19
7 9	7 14	10 6	0 8 $\frac{3}{4}$	0 6 $\frac{3}{4}$	1 5 $\frac{1}{4}$	0 13 $\frac{1}{4}$	2 11 $\frac{1}{4}$	0 19 $\frac{1}{4}$	2 11 $\frac{1}{4}$	0 19 $\frac{1}{4}$	2 11 $\frac{1}{4}$	0 19 $\frac{1}{4}$	2 11 $\frac{1}{4}$	0 19 $\frac{1}{4}$
8 0	7 10	10 2	0 9	0 6 $\frac{1}{2}$	1 6	0 14	3 0	0 20	3 0	0 20	3 0	0 20	3 0	0 20
8 3	7 5	9 15	0 9 $\frac{1}{4}$	0 7	1 7	0 14 $\frac{1}{4}$	3 1	0 20 $\frac{1}{4}$	3 1	0 20 $\frac{1}{4}$	3 1	0 20 $\frac{1}{4}$	3 1	0 20 $\frac{1}{4}$
8 6	7 2	9 9	0 9 $\frac{1}{2}$	0 7 $\frac{1}{2}$	1 7 $\frac{1}{2}$	0 15	3 2	0 21	3 2	0 21	3 2	0 21	3 2	0 21
8 9	6 15	9 4	0 10	0 7 $\frac{1}{2}$	1 8	0 15 $\frac{1}{2}$	3 4	0 21 $\frac{1}{2}$	3 4	0 21 $\frac{1}{2}$	3 4	0 21 $\frac{1}{2}$	3 4	0 21 $\frac{1}{2}$
9 0	6 13	8 15	0 10 $\frac{1}{4}$	0 7 $\frac{3}{4}$	1 8 $\frac{1}{4}$	0 16	3 5	0 22	3 5	0 22	3 5	0 22	3 5	0 22
9 3	6 9	8 12	0 10 $\frac{1}{2}$	0 8	1 9	0 16 $\frac{1}{2}$	3 6 $\frac{1}{2}$	0 22 $\frac{1}{2}$	3 6 $\frac{1}{2}$	0 22 $\frac{1}{2}$	3 6 $\frac{1}{2}$	0 22 $\frac{1}{2}$	3 6 $\frac{1}{2}$	0 22 $\frac{1}{2}$
9 6	6 7	8 8	0 10 $\frac{3}{4}$	0 8 $\frac{1}{4}$	1 9 $\frac{1}{4}$	0 17	3 7 $\frac{1}{4}$	0 23	3 7 $\frac{1}{4}$	0 23	3 7 $\frac{1}{4}$	0 23	3 7 $\frac{1}{4}$	0 23
9 9	6 4	8 5	0 11	0 8 $\frac{1}{2}$	1 10	0 17 $\frac{1}{2}$	3 8 $\frac{1}{2}$	0 23 $\frac{1}{2}$	3 8 $\frac{1}{2}$	0 23 $\frac{1}{2}$	3 8 $\frac{1}{2}$	0 23 $\frac{1}{2}$	3 8 $\frac{1}{2}$	0 23 $\frac{1}{2}$
10 0	6 1	8 2	0 11 $\frac{1}{2}$	0 8 $\frac{3}{4}$	1 11	0 18	3 10	0 24	3 10	0 24	3 10	0 24	3 10	0 24
10 3	5 15	7 15	0 11 $\frac{3}{4}$	0 8 $\frac{3}{4}$	1 11 $\frac{1}{4}$	0 18 $\frac{1}{4}$	3 11 $\frac{1}{4}$	0 24 $\frac{1}{4}$	3 11 $\frac{1}{4}$	0 24 $\frac{1}{4}$	3 11 $\frac{1}{4}$	0 24 $\frac{1}{4}$	3 11 $\frac{1}{4}$	0 24 $\frac{1}{4}$
10 6	5 13	7 12	1 0	0 9	2 0	0 19	4 0	0 25	4 0	0 25	4 0	0 25	4 0	0 25
10 9	5 11	7 9	1 0 $\frac{1}{4}$	0 9 $\frac{1}{4}$	2 0 $\frac{1}{4}$	0 19 $\frac{1}{4}$	4 1	0 25 $\frac{1}{4}$	4 1	0 25 $\frac{1}{4}$	4 1	0 25 $\frac{1}{4}$	4 1	0 25 $\frac{1}{4}$
11 0	5 9	7 5	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	2 1	0 20	4 2	0 26	4 2	0 26	4 2	0 26	4 2	0 26
11 3	5 6	7 3	1 0 $\frac{3}{4}$	0 9 $\frac{3}{4}$	2 1 $\frac{1}{4}$	0 20 $\frac{1}{4}$	4 3 $\frac{1}{4}$	0 26 $\frac{1}{4}$	4 3 $\frac{1}{4}$	0 26 $\frac{1}{4}$	4 3 $\frac{1}{4}$	0 26 $\frac{1}{4}$	4 3 $\frac{1}{4}$	0 26 $\frac{1}{4}$
11 6	5 3	7 1	1 1	0 10	2 2	0 21	4 4	0 27	4 4	0 27	4 4	0 27	4 4	0 27

Price

Price of the bush- el of wheat & baking.	Weight.		Prized Bread.							
	The Penny loaf.		Quartern loaf.		Half peck.		Peck loaf.			
	Wheat.	Household.	Wheat.	Household.	Wheat.	Household.	Wheat.	Household.	Wheat.	Household.
s. d.	oz. dr.	oz. dr.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
11 9	5 2	6 15	1 1 $\frac{1}{2}$	0 10	2 3	1 8	4 5	3 4		
12 0	5 1	6 13	1 1 $\frac{1}{4}$	0 10 $\frac{1}{2}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	4 7	3 5		
12 3	4 15	6 10	1 2	0 10 $\frac{1}{4}$	2 4	1 9	4 8	3 6		
<hr/>										
12 6	4 14	6 8	1 2 $\frac{1}{4}$	0 10 $\frac{3}{4}$	2 4 $\frac{1}{2}$	1 9 $\frac{1}{2}$	4 9	3 7		
12 9	4 13	6 5	1 2 $\frac{1}{2}$	0 11	2 5	1 10	4 10	3 8		
13 0	4 11	6 4	1 3	0 11 $\frac{1}{4}$	2 5 $\frac{1}{2}$	1 10 $\frac{1}{2}$	4 11 $\frac{1}{2}$	3 8 $\frac{1}{2}$		
<hr/>										
13 1	4 9	6 3	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 6 $\frac{1}{2}$	1 10 $\frac{1}{2}$	5 1	3 9		
13 6	4 8	6 1	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7	1 11	5 2	3 0		
13 9	4 7	5 15	1 3 $\frac{3}{4}$	0 11 $\frac{3}{4}$	2 7 $\frac{1}{2}$	1 11 $\frac{1}{2}$	5 3	3 12		
<hr/>										
14 0	4 5	5 13	1 4	1 0	2 8	2 0	5 4	4 0		
14 3	4 4	5 11	1 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	2 8 $\frac{1}{2}$	2 0 $\frac{1}{2}$	5 5	4 1		
14 6	4 3	5 9	1 5	1 0 $\frac{1}{2}$	2 9	2 1	5 6	4 2		

Note, The wheaten loaves are three-fourths of the weight of the household loaves; and if the magistrates or justices shall think fit to allow of any white loaves of the price of one penny or two pence, they are to weigh at all times three-fourths of the weight of the wheaten loaves of the same price.

Note, The prices of the household loaves are always three-fourths of the prices of the wheaten loaves; and where it shall be thought proper to allow of half quartern loaves, the prices of such loaves (if sold singly) are to be half a farthing higher than is allowed by this table, when it shall so happen that the farthing is split.

And magistrates and justices within their respective jurisdictions being to set the assize and fix the price of the several loaves of bread having respect to the price which the grain, meal or flour shall bear in the markets. But no provision being made, how they should know what price the respective sorts of meal and flour should be esteemed to bear in proportion to the price of wheat they are therefore to take notice that the peck loaf of each sort of bread is to weigh, when well baked, 17 lb. 6 oz. averdupois, and the rest in proportion; and every sack of meal or flour is to weigh 2 cwt. 2 qrs. net; from every sack of meal or flour there ought to be produced, on the average, 20 such peck loaves of bread; and, by observing the said rule, magistrates and justices may at all times know if the baker hath more or less than the allowance they intend to give him.

T A B L E II.

OF BREAD MADE OF SEVERAL GRAINS.

The first column contains the prices of the bushel of Grain, baking included: which prices are adapted so as to serve either for the Winchester bushel of rye, of barley, of oats, of beans, of maslin *alias* miscellany, consisting of two-thirds wheat and one-third rye; the price of either of which bushels in the market being known, the magistrates are to add the intended allowance thereto; the amount of which being found in column No. I. the weight which the several loaves ought to be of, will be found under column No. II. and the price of the respective peck loaves (which are to weigh 17 lb. 6 oz. each) under No. I.

Note, Where bread is allowed at any time to be made for sale of pease only, the assize and price thereof are to be set and fixed from the bean columns; and where bread is ordered to be made for sale of a coarse sort of maslin or miscellany grain, consisting of one-third rye, one-third barley, and one-third either pease or beans, the assize and price thereof are to be set and fixed from the barley columns.

Note also, That this table is framed for bread to be made of the whole produce of the said several grains, except the bran or hull thereof only.

No. I.		No. 2.										No. 3.									
Price of the bushel and baking.		Weight of the penny loaf.										Price of the peck loaf.									
s.	d.	Rye.		Barley.		Oats.		Beans.		Maslin.		s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
1	0	32	8	67	8	31	4	83	12	70	0	0	4	0	4	0	9	0	3	0	4
1	3	50	0	54	0	25	0	67	0	56	0	0	5	0	5	0	11	0	4	0	5
1	6	41	10	45	0	24	14	55	12	46	10	0	6	0	6	1	1	0	5	0	6
1	9	35	11	38	9	17	14	47	14	40	0	0	7	0	7	1	3	0	5	0	7
2	0	31	4	33	12	15	10	41	14	35	0	0	8	0	8	1	5	0	6	0	8
2	3	27	13	30	0	13	14	37	4	31	2	0	10	0	9	1	7	0	7	0	9
2	6	25	0	27	0	12	8	33	8	28	0	0	11	0	10	1	10	0	8	0	10
2	9	22	11	24	9	11	6	30	7	25	6	1	0	0	11	2	1	0	9	0	11
3	0	20	13	22	8	10	7	27	14	23	5	1	1	1	0	2	2	0	10	1	0
3	3	19	4	20	12	9	10	25	12	21	8	1	2	1	1	2	4	0	10	1	1
3	6	17	13	19	4	8	15	23	15	20	0	1	3	1	2	2	6	0	11	1	2
3	9	16	11	18	0	8	5	22	5	18	10	1	4	1	3	2	8	1	0	1	3
4	0	15	10	16	14	7	13	20	15	17	8	1	5	1	4	2	11	1	1	1	4
4	3	14	12	15	14	7	6	19	11	16	8	1	6	1	5	3	0	1	2	1	5
4	6	13	14	15	0	6	15	18	10	15	9	1	8	1	7	3	2	1	3	1	6
4	9	13	2	14	4	6	9	17	11	14	12	1	8	1	8	3	5	1	3	1	7
5	0	12	8	13	8	6	4	16	12	14	0	1	10	1	9	3	2	1	4	1	8
5	3	11	14	12	14	5	15	15	15	13	5	1	11	1	10	3	11	1	5	1	9
5	6	11	5	12	4	5	11	15	3	12	11	2	0	1	11	4	1	1	7	1	10
5	9	10	13	11	12	5	7	14	9	12	2	2	1	2	0	4	3	1	7	1	11
6	0	10	6	11	4	5	3	13	15	11	10	2	2	2	1	4	5	1	8	2	0
6	3	10	0	10	13	5	0	13	6	11	3	2	3	2	2	4	7	1	8	1	1
6	6	9	10	10	6	4	13	12	14	10	12	2	5	2	3	4	9	1	9	2	2
6	9	9	4	10	0	4	10	12	6	10	6	2	6	2	4	5	0	1	10	2	3
7	0	8	15	9	10	4	7	11	15	10	0	2	7	2	5	5	1	1	11	2	4

† Sect. 9. And it is farther enacted par. 5. "That every
" assize shall be set in averdupoize weight, of sixteen ounces
" to the pound, and not troy weight, and in the several pro-
" portions directed by the tables, or as near as may be; and
" that the said tables shall extend as well to bread made
" with wheat mixed with other grain, as to bread made with
" other grains than wheat, publickly licensed to be made
" into bread; and that the assize of all such mixed bread shall
" be set and ascertained as near as may be, to the said
" tables."

Assize to be set
in averdupoize
weight, directed
by the tables.

† Sect. 10. And it is further enacted, par. 6. "That the
" prices which the several kinds of grain, meal, and flour,
" shall, *bona fide*, sell for in *London*, in open and publick mar-
" ket, shall be certified on oath, on some certain day in every
" week, as the mayor and aldermen shall appoint, by the
" meal weighers of *London*, or such persons as the said court
" shall direct; and shall also on some certain day in every
" week, to be appointed by the said court, be entered by such
" persons in writing, and kept at the town clerk's office in
" the said city: And the next day after every such price shall
" be so certified, the assize and weight of all sorts of bread to
" be sold within the limits of their jurisdiction, and the price
" to be paid for the same, shall be set by the said court of
" mayor and alderman, if the said court shall then sit, and if
" not, then by the mayor of the said city; and that the assize
" so set in *London* shall take place as the said court shall
" order, and be in force for *London* and the liberties thereof,
" and the weekly bills of mortality (the city of *Westminster*
" and liberties thereof, the borough of *Southwark*, and weekly
" bills of mortality in the county of *Surry* excepted) until
" another assize in *London* shall be set; and that the assize so
" set, shall, with all convenient speed be made public in such
" manner as the said court of mayor and aldermen shall
" direct: but before any advance or reduction shall in any
" week be made by the said court or the mayor in the price
" of bread, the meal weighers or other persons shall leave
" in writing at the common hall of the company of Bakers
" in *London*, a copy of every return of the price of grain,
" meal, and flour, which they shall make, and enter in such
" book as aforesaid, some time of the same day on which such
" meal weighers or other persons shall make every such return
" and entry; to the intent that the said company of Bakers
" may the morning of the next day after every such return
" and entry made, and before any assize shall be set, have an
" opportunity to offer to the mayor and aldermen, and if
" such court shall not then sit, to the mayor, all such objec-
" tions as the said company of Bakers shall think fit against
" any advance or reduction being that day made."

Return to be
made weekly to
the court of
aldermen of
London, of the
prices which the
grain sell for
to be entered
in a book in the
town clerk's of-
fice; the assize
to continue till
a new assize be
set.

The meal weigh-
ers are to leave
at the Bakers
Hall a copy of
the returns.

† Sect.

The court and magistrates, &c. in other cities, towns, and boroughs, may, cause returns to be made; the prices to be entered and certified; the assize to be set within 2 days after; and to continue (not exceeding 7 days.)

† *Secl.* 11. And it is further enacted, par. 7. "That the court of mayor and aldermen of every other city, and where there shall be no such court, or when the same shall not sit, the chief magistrate of every other city; and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magistrate, or two justices where there shall be no such mayor, bailiffs, aldermen, or chief magistrates; shall severally and respectively, cause the respective prices which the several sorts of grain, meal, and flour, proper to make bread allowed to be made in every such other city, town corporate, borough, town, or place, shall, *bona fide*, sell for, in the respective publick markets in or near to every such other place, to be certified upon oath, unto such magistrates as aforesaid, in such manner in every week, as any such respective court or magistrates shall appoint; and the price so certified shall be entered by the person who shall certify the same in some book, kept by him for that purpose; and within two days after the assize and weight of bread, shall be set by the persons and in the jurisdictions as aforesaid respectively, the same shall take place on such day in every week, and be in force for such time, not exceeding seven days from the setting of every such assize, and shall be made public in such manner, as such magistrates as aforesaid shall within their respective jurisdictions direct."

Two or more justices may set an assize and cause returns to be made.

(a) For the form of the certificate which must be signed with the name of the person who returns it, vide the act, *sect.* 11. And 1 Burn 243.

(b) For the form of the publication, vide the act, *sect.* 12. And 1 Burn 244.

† *Secl.* 12. And be it further enacted, par. 8. "That if any two justices of counties shall set an assize, it shall be lawful for them to cause the price which grain, meal, and flour, fit to make bread, shall, *bona fide*, sell for in the respective publick corn markets, in or near the place or places respectively, to be certified on oath (a) to them at their respective places of abode, in any such county, on such day in every week as they shall appoint, by the respective clerks of the market, or such other person as any such two justices shall appoint; and that the price of grain, meal, and flour, so returned, shall be entered by the person who shall return the same, in some book kept by him for that purpose; and within two days after the price and assize of bread may be by any two justices set for any time not exceeding fourteen days from every setting thereof; and the assize which shall be so set, shall commence and be in force at such time, and be made publick (b) in such place or places, for which the same shall be so set, as the said justices shall direct."

Bakers may see the returns that they may object to the assize.

† *Secl.* 13. And be it further enacted, par. 9. "That any baker shall have liberty, the day after every return shall be made, and entered in the book, to see the entry without paying

“ paying any thing; to the intent that he may have an opportunity on the said next day to offer to any such court, mayor, bailiffs, aldermen, or other chief magistrate or magistrates, or justices, as aforesaid, before any such assize shall be set, such objections as any such baker can reasonably make against any advance or reduction being made.”

† *Sec. 14.* And be it further enacted, par. 9. “ That no maker of bread for sale shall pay any fee or reward for any assize, or published.” Not liable to fees.

† *Sec. 15.* And it is further enacted, par. 11. “ That the half peck and quarter of a peck loaves of wheaten and household bread are to weigh in proportion to the weight a peck loaf of wheaten or household bread ought to weigh, and are to be sold according to the price a peck loaf of wheaten or household bread respectively is to be sold; and whenever any bread shall be ordered to be made with the meal or flour of rye, barley, oats, peas, or beans, either alone, or mixed, the assize of such bread shall be made publick in such manner as the said magistrate, who shall set such assize, shall direct.” Half peck and quarter loaves to weigh, and be sold, in due proportion to the peck loaf.

† *Sec. 16.* And it is also enacted, par. 13. “ That in places where any sixpenny, twelpenny, and eighteenpenny loaves shall be allowed, no peck, half peck, or quarter of a peck loaves shall be permitted at the same time to be there made or sold, upon pain of any sum not exceeding forty, nor less than twenty shillings.” Where bread of a certain denomination and value shall be ordered.

† *Sec. 17.* And it is further enacted, par. 14. “ That if the justices of any county or division shall, at sessions, think fit to fix, that any hundred, or other place in such county or division, ought to be considered as in any one particular hundred, riding, or division, of such county, riding, or division, in order that the assize of bread for such particular hundred or place may extend to or comprize such other hundred, or place it shall be lawful for them so to do; but by so doing, no justice shall be excluded from acting as a justice in any hundred, riding, or division of any such county in which any such particular towns, districts, or places shall lie, or the assize for them shall be set.” Sessions may fix the jurisdiction of any place within a certain district.

† *Sec. 18.* And it is likewise enacted, par. 15. “ That an entry shall be made by every clerk of the market, or other person, of every return, and of the rate at which the price, assize, and weight of bread shall be set or fixed within the jurisdiction” Entry to be made by every clerk of the market, &c.

“ jurisdiction of every such clerk of the market, or other
 “ persons, which any inhabitant shall inspect without fee.”

No alteration
 unless price of
 grain, shall
 vary 3 d. in the
 bushel from the
 last return.

† *Sec. 19.* And be it also enacted, par. 16. “ That after
 “ an assize shall be set, no alteration shall be made therein in
 “ any subsequent week, either to rise the same higher, or to
 “ sink the same lower, unless the price of wheat, or other
 “ grain, shall be returned as having rose three pence each bu-
 “ shel, more than the last return made, or having fallen three
 “ pence each bushel lower than the said last return; no pro-
 “ vision being made by the said assize tables for altering any
 “ assize upon such an event.”

Forfeiture of
 any meal
 weigher, clerk,
 &c. who shall
 neglect his du-
 ty, and any
 peace officer,
 who shall diso-
 bey.

† *Sec. 20.* And it is likewise enacted, par. 17. “ That
 “ if any person appointed to certify or return the price of
 “ grain, meal, and flour, shall neglect any matters required to
 “ be done by him, or shall designedly make any false certifi-
 “ cate or return; or if any peace-officer shall neglect to obey
 “ any warrant in writing delivered to him under the hand and
 “ seal of any magistrate, or to do any other act requisite to
 “ be done by him, shall forfeit not exceeding five pounds, nor
 “ less than twenty shillings.”

Penalty for re-
 fusing to disclose
 the true prices
 of grain, meal,
 and flour, or
 for giving in
 a false or collu-
 sive price.

† *Sec. 21.* And it is further enacted, par. 18. “ That in
 “ case any dealers in corn, grain, meal, or flour, on reasonable
 “ request by the meal weighers of London, or by the clerks of
 “ the markets, or other persons, appointed to give in and cer-
 “ tify the prices of grain, meal, and flour, shall refuse to make
 “ known the true real prices the several sorts of grain, meal,
 “ and flour, shall be *bona fide* bought at, or sold, by or for
 “ him, her, or them respectively, at any corn market, with-
 “ in the jurisdiction of any such persons aforesaid, or shall
 “ knowingly give in any false or untrue price of any grain,
 “ meal, or flour, bought or sold, or agreed so to be, or any
 “ price which hath been made by any deceitful means, on
 “ being convicted by the oath of one witness, or solemn af-
 “ firmation, or on confession, shall forfeit not exceeding ten
 “ pounds, nor less than forty shillings.”

What shall be
 done where any
 false return
 shall be suspec-
 ted.

† *Sec. 22.* And it is further enacted, par. 19. “ That if
 “ any such court, magistrate, or justices, as aforesaid, who
 “ shall have ordered any return, shall, within three days af-
 “ ter such return made, suspect that the same was not truly
 “ and *bona fide* made, it shall be lawful to summon before them
 “ respectively, any person who shall have bought or sold, or
 “ shall be suspected to have bought or sold, or agreed to buy
 “ or sell, any grain, meal, or flour, or who shall be thought
 “ to be likely to give any information concerning the pre-
 “ mises, and to examine them respectively upon their several
 “ oaths, touching the rates and prices the several sorts of
 “ grain,

“ grain, meal, and flour, or any of them, were there really
 “ and *bona fide* bought at, or sold for, or agreed so to be by
 “ him, her, or them, respectively, at any time within seven
 “ days preceding the summoning: and if any person so sum-
 “ moned shall neglect to appear, (and proof be made on oath
 “ of such summons having been duly served) or if any person
 “ so summoned shall appear, and neglect or refuse to answer
 “ lawful questions, on being convicted by the oath of one
 “ witness, or confession, before any such court, magistrate,
 “ or justices, shall forfeit not exceeding ten pounds, and not
 “ less than forty shillings: and if any person, so examined on
 “ oath, shall forswear himself, such person shall be liable to
 “ be prosecuted as for perjury, by indictment or information,
 “ provided that the party so summoned be not obliged to travel
 “ above five miles from the place of his abode.”

Party not oblig-
 ed to travel
 above 5 miles.

† *Stat.* 23. And it is further enacted, par. 20. “ When-
 “ ever any court, as aforesaid, magistrate, or justices, shall
 “ order any bread to be made with the meal of any other
 “ grain than wheat, or to be mixed with wheat, or to be made
 “ with the meal of any other sort of grain, either separate or
 “ mixed together, all persons shall make bread for sale with
 “ such mixed meal, or of such weight and goodness, and shall
 “ sell the same at such prices, as such court, magistrates, or
 “ justices, shall direct, upon pain of any sum not exceeding
 “ five pounds, nor less than forty shillings.”

Bakers to make
 the bread of
 such weight
 goodness, and
 price, as shall
 be directed.

† *Stat.* 24. And it is further enacted, par. 21. “ That the
 “ several sorts of bread shall be well made, according to the
 “ goodness of the several sorts of meal, whereof the same ought
 “ to be made, and that no allum, or any mixture or ingredi-
 “ ent whatsoever (except only the genuine meal, common
 “ salt, pure water, eggs, milk, yeast, and barm, or such leaven
 “ as shall be allowed by the court, or person who shall have
 “ set an assize of bread where any such leaven shall be used,
 “ and where no such assize shall have been set, then such
 “ leaven as any magistrate or justice shall allow, shall be used
 “ in making dough, or any bread to be sold, upon pain that
 “ every person (other than a servant or journeyman) who shall
 “ knowingly offend, and be convicted by confession, or by
 “ oath of one witness, before any such magistrate or justice,
 “ shall forfeit not exceeding ten pounds, and not less than
 “ forty shillings, or shall be committed to the house of cor-
 “ rection, or some prison of the county or place where the of-
 “ fence shall be, to hard labour, not exceeding one calendar
 “ month, nor less than ten days. And if any servant shall of-
 “ fend, he shall forfeit, not exceeding five pounds, and not less
 “ than twenty shillings, or be apprehended and committed as
 “ aforesaid; and it shall be lawful for the magistrate or justice,
 “ before

No adultera-
 tion or mix-
 ture, except the
 genuine meal or
 flour, salt, wa-
 ter, eggs, milk,
 yeast, and barm,
 or such leaver.
 as shall be occa-
 sionally allowed.

“ before whom any such offender shall be convicted, out of the
 “ money forfeited, to cause the offender's name, place of
 “ abode, and offence, to be published in some newspaper,
 “ which shall be printed or published in or near the county,
 “ city, or place, where any such offence shall have been
 “ committed.”

The penalty of
 adulterating
 corn, meal, or
 flour.

† *Sec.* 25. And it is further enacted, par. 22. “ That no
 “ person shall put into any corn, meal, or flour, ground,
 “ dressed, bolted, or manufactured for sale, any mixture or
 “ thing whatsoever, or shall knowingly sell, offer, or expose
 “ to or for sale, any meal of one sort of grain as or for the
 “ meal of any other sort of grain, or any thing as or for, or
 “ mixed with, the meal of any grain, which shall not be the
 “ real and genuine meal of the grain the same shall import to
 “ be, upon pain of forfeiting any sum not exceeding five
 “ pounds, nor less than forty shillings.”

Penalty where
 bread shall be of
 a different mix-
 ture of corn than
 what it impor-
 teth to be of, or
 is allowed.

† *Sec.* 26. And it is further enacted, par. 23. “ That no
 “ person shall put into any bread made for sale, any mixture
 “ of meal of any other sort of grain than of the grain the
 “ same shall import to be, and allowed to be made of, or any
 “ larger or other proportion of any other or different sort of
 “ grain, or the meal thereof, than what shall be allowed, or
 “ any mixture or thing in lieu of flour, which shall not real-
 “ ly be the genuine flour the same shall import and ought to
 “ be, upon pain of forfeiting not exceeding five pounds, nor
 “ less than twenty shillings.”

Penalty for mak-
 ing bread un-
 der weight, &c.

† *Sec.* 27. And it is further enacted, par. 24. “ That if
 “ any person shall make, send out, sell, or expose to or for
 “ sale, any bread deficient in weight, he shall forfeit not ex-
 “ ceeding five shillings, nor less than one shilling, for every
 “ ounce deficient; and for every loaf found wanting less than
 “ an ounce not exceeding two shillings and sixpence, nor less
 “ than sixpence, so as such bread which shall be complained
 “ of for wanting weight in any city, town-corporate, bo-
 “ rough, liberty, or franchise having jurisdiction thereof, or
 “ within the bills of mortality shall be brought before some
 “ magistrate, and weighed, within twenty-four hours after,
 “ and so as such bread which shall be so complained of as
 “ in any hundred, riding, division, liberty, rape, wapen-
 “ take, or place, shall be brought before some justice of such
 “ place, and weighed within three days after, unless such de-
 “ ficiency wholly arose from some accident, or was occasioned
 “ by some contrivance or confederacy.”

All bread to be
 fairly marked.

† *Sec.* 28. And it is further enacted, par. 25. “ That
 “ every baker shall cause to be fairly marked on every loaf of
 “ wheaten bread a large Roman W. and upon every loaf of
 “ household or brown bread a large Roman H. so as the same
 “ may

" may, on the view thereof, be ascertained under what denomination of bread every such loaf was made, (except such loaves which shall be raised by the desire of any person who shall order the same, on pain of forfeiting not exceeding twenty, nor less than five shillings."

† *Sec. 29.* And it is further enacted, par. 26. " That no person shall take for any bread a higher price than shall be ascertained by the court, magistrate, or justices, authorised to set the price and assize, nor refuse to sell any to any person who shall tender ready money for the same, at the price such bread, by the assize, shall be fixed at, when he shall have any such bread in his house or possession, to be sold, more than shall be requisite for the immediate necessary use of his own family or customers; and it shall be incumbent on such baker to prove the contrary, upon pain of forfeiting not exceeding forty, nor less than ten shillings."

Bakers taking a higher price or refusing to sell

† *Sec. 30.* And it is hereby likewise enacted, par. 26. " That if any person shall offer to sale any bread of an inferior quality to wheaten bread, at a higher price than household bread shall be set at by the assize, he shall forfeit, by confession, or the oath of one witness, twenty shillings."

Bread inferior to wheaten not to be higher than household.

† *Sec. 31.* It is further enacted by par. 27. and by 32 Geo. 2. c. 18. s. 2. " That any magistrate or justice, and also any peace officer, authorised by warrant of any such magistrate in the day-time, may enter into any house, shop, stall, bakehouse, warehouse, or out-house, of or belonging to any baker, or seller of bread, to search for, view, weigh, and try, all or any the bread which shall be there found: and if any bread, on any such search, shall be found to be wanting, either in the goodness of the stuff whereof the same shall be made, or to be deficient in the due baking or working thereof, or shall be wanting in the due weight, or shall not be truly marked according to the directions of this act, or shall be of any other sort of bread than shall be allowed to be made by virtue of this act; any such magistrate or peace officer may seize the same, and dispose thereof as he shall think fit."

The houses, shops, &c. of bakers may be searched, and the bread weighed.

† *Sec. 32.* And it is further enacted, par. 28. " That if information shall be given on oath to any magistrate or justice that there is cause to suspect that any miller who grinds any grain for reward, or any person who doth dress, bolt, or in any wise manufacture any meal or flour for sale, or any maker of bread for sale, doth mix up with, or put into, any meal or flour ground or manufactured for sale, any

Where any miller, mealman, or baker, shall be suspected of adulterating; the magistrate, &c. upon information on oath, may enter the premises him-

self, and search, or may grant a search warrant to some peace officer; and such meal and flour as shall be deemed adulterated, may be seized.

“ mixture, ingredient, or thing whatsoever, not the genuine produce of the grain such meal or flour, shall import and ought to be, or whereby the purity of any meal or flour, in the possession of any such miller, mealman, or baker, is or shall be in anywise adulterated; then such magistrate or justice, and also any peace officer, authorised by warrant in the day-time, on information may enter into any house; mill, shop, bakehouse, stall, bolting house, pastry, warehouse, or out-house, of or belonging to any such miller, mealman, or baker, and to search and examine; and if on any such search it shall appear that any offence hath been committed, contrary to this act; then any magistrate, justice, or officer authorised as aforesaid respectively, may seize and take any meal or flour which shall be deemed, on any such search, to have been adulterated, and all mixtures and ingredients which shall be found and deemed to have been used, or intended to be used, in or for any such adulteration; and such thereof as shall be seized by any peace officer or officers authorised as aforesaid, shall be carried to some magistrate or justice; and if any magistrate or justice, who shall make any seizure in pursuance of this act, or to whom any thing seized under the authority of this act shall be brought, shall adjudge that any mixture or ingredients, not the genuine produce of the grain which such meal or flour so seized, shall import and ought to be, shall have been put into any such meal or flour, or that the purity of any such meal or flour so seized, was adulterated by any mixture or ingredient put therein; then, every such magistrate or justice, is hereby required to dispose of the same as he shall think proper.”

And the miller, mealman, or baker's forfeit, not exceeding ten pounds.

† *Sec. 33.* And it is further enacted, par. 29. “ That every miller, mealman, baker, or seller of bread as aforesaid, in whose house, mill, shop, bake-house, stall, bolting-house, pastry, warehouse, out-house, or possession, any mixture or ingredient shall be found, which shall be adjudged by any magistrate or justice to have been lodged there, with an intent to have adulterated the purity of meal, flour, or bread, shall, on being convicted by confession, or the oath of one witness, forfeit not exceeding ten pounds, nor less than forty shillings;—unless that such mixture or ingredients was or were not brought or lodged with any design or intent to have been put into any meal or flour, or to have adulterated therewith the purity of any meal or flour, but that the same was in the place for some other lawful purpose.”

Exception.

“ And the magistrate out of the money forfeited, may cause the offender's name, place of abode, and offence, to be published, in some news paper in or near the county, city
“ or

“ or place, where any such offence shall have been committed.”

† *Sec.* 34. And it is further enacted, par. 30. “ That if any person shall wilfully obstruct any search or seizure, or shall oppose any such search being made, or the carrying away any such ingredients as aforesaid, or any bread which shall be seized, as not being made pursuant to this act, he shall forfeit not exceeding five pounds, nor less than twenty shillings.”

Obstructing any search or seizure.

† *Sec.* 35. Provided always, par. 31. “ That no miller, mealman, or baker, shall act as a magistrate, or justice of the peace, under this act, on pain of fifty pounds to any person who will sue for the same, by action of debt, &c. at Westminster, or by summary complaint before the court of Session in Scotland.”

No miller, mealman, or baker, to act as a magistrate.

† *Sec.* 36. Provided also, par. 32. “ That if any baker shall make complaint to any magistrate by the oath of one witness that any offence shall have been occasioned through the wilful neglect of any servant, then such magistrate may issue his warrant for bringing such servant before any such magistrate, or any magistrate or justice of the county or place where the offender can be found, and examine into the complaint; and, on proof thereof upon oath, by any order under his hand, may adjudge what sum shall be paid by such servant to his master or mistress, by way of recompence for the money he or she shall have paid by reason of the wilful neglect of any such servant; and if any such servant shall neglect on his conviction to make immediate payment, he shall be committed to the house of correction, or some other prison of the county or place in which any such servant shall be apprehended or convicted, to be there kept to hard labour not exceeding one calendar month, unless payment shall be made before the expiration of the said term.”

Where the penalty was occasioned by the journeyman or servant, a recompence to be paid to the master.

† *Sec.* 37. And it is further enacted, by par. 33. “ That the mayor of London, or any alderman within the liberties thereof, and any other justice, or any one of them, within their respective jurisdictions, may hear and determine, in a summary way, all offences against this act, and summon any offender; and in case the party shall not appear or offer some reasonable excuse for his default, then upon oath by one witness of any offence committed contrary to this act, any such magistrate shall issue his warrant for apprehending the offender; and upon the appearance, or in case he shall not appear, on notice being left at his usual place of abode, or if he cannot be apprehended, then such ma-

Offences heard and determined in a summary way, and offenders may be summoned.

“ magistrate is authorized to proceed to make inquiry touching the matters complained of, and to examine any witnesses who shall be offered on either side, on oath, as aforesaid, and shall convict or acquit the party accused; and if the penalty, on any such conviction, shall not be paid within twenty-four hours after, every such magistrate shall thereupon issue a warrant, directed to any peace officer within their respective jurisdictions, to make distress; and if any offender shall convey away his goods, or so much thereof that the penalty cannot be levied, then some magistrate within whose jurisdiction the offender shall have removed his goods, shall back the warrant, for levying the distress; and if within five days from the distress being taken, the money forfeited shall not be paid, the goods seized shall be appraised and sold, and for want of such distress, then every such magistrate, on the application of any prosecutor, and proof made of the conviction and non-payment of the penalty and charges, by warrant under his hand and seal, shall commit every such offender to the common gaol or house of correction of the city or place where such offender or offenders shall be found, for one calendar month, unless payment shall be made of the said penalty, costs and charges, before the expiration of the said one calendar month.— And all such penalties and forfeitures, when recovered, shall be paid to the informer.”

† *Seet.* 38. But by 32 Geo. 2. c. 18. the generality of this application of the forfeiture to informers is restrained, and it is enacted, “ That the penalties not *particularly* disposed of by 31 Geo. 2. c. 29. where the conviction is by confession or the oath of one witness, shall be, *one moiety* to the informer; and the other moiety, together with all penalties incurred on the weighing, trying, or seizing of any bread by any magistrate or justice shall be applied for the better carrying the said act into execution, as such magistrate or justice shall think fit.”

Power to summon material evidences.

Witnesses to be examined on oath.

† *Seet.* 39. And it is further enacted, par. 34. “ That if it shall be made out by the oath of any credible person, that any one is likely to give material evidence on behalf of the prosecutor or the person accused, and will not voluntarily appear before such magistrate to be examined, every such magistrate is authorized to summons every such witness; and if any person so summoned shall neglect to appear, and no just excuse shall be offered, then (after proof by oath of such summons having been duly served) every such magistrate is authorized to issue his warrant under his hand and seal, to bring and examine upon oath every such witness: and if on his appearance he shall refuse to be

“ examined

“ examined on oath concerning the premises, without offering any just excuse, any such magistrate may, by warrant, commit any person so refusing to the public prison of the county or place in which he shall be, there to remain not exceeding fourteen, nor less than three days.”

† *Seff.* 40. And it is further enacted, par. 37. “ That no *certiorari*, letters of advocacy, or of suspension shall be granted to remove any conviction, or other proceedings had thereon in pursuance of this act.” No *certiorari*, &c.

† *Seff.* 41. Provided, par. 38. “ That if any person shall think himself aggrieved, he shall have liberty to appeal to the next general or quarter sessions for the county or place, upon entering into a recognizance at the time of conviction, with two sufficient sureties, in double the sum which he shall have been adjudged to pay, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of said next general or general quarter sessions, who shall finally determine the matter of every such appeal, and award costs to be paid by either party: and if the judgment shall be affirmed, such appellant shall immediately pay down the sum he shall have been adjudged to forfeit, with such costs as the sessions shall award to the prosecutor or informer, for the expences sustained by such appeal; and in default of paying the same, any two such justices, or any one magistrate or justice of the peace, having jurisdiction in the place into which any such appellant shall escape, or where he shall reside, shall commit every such appellant to the common gaol of the county or place where he shall be apprehended, until he shall make payment; but if the appellant make good his appeal, costs shall be awarded to the appellant against such informer, and which costs may be recovered by the appellant against any such informer, in like manner as costs given at any general or general quarter sessions of the peace are recoverable.” Persons aggrieved may appeal to the next sessions. Appellant is to enter into recognizance, to hear and determine the matter, and award costs.

† *Seff.* 42. Provided, par. 39. “ That if any such conviction shall be made within six days before any general or general quarter sessions for the county or place where such conviction shall have been made, then the party aggrieved shall, on entering into a recognizance as before directed, appeal either to the then next or the next following sessions.” Appeal to the sessions following.

† *Seff.* 43. And it is further enacted, par. 40. “ That every action or suit brought against any magistrate or any peace officer, Limitation of actions.

Vide the reasons for extending the protection of this statute, to persons acting under the present act. 1 Burn's Justice, p. 256.

Officer may make tender of amends.

Persons may plead the general issue, and obtain treble costs.

Prosecution in 3 days.

“ officer, for any thing done under this act, shall be commenced within six months next after the fact committed, and shall be laid in the county, city, or place, where the matter shall arise; and that the 24 Geo. 2. c. 44. so far as relates to the rendering the justices more safe in the execution of their office, shall extend to the magistrate acting under this act; and that no action or suit shall be had, nor any writ sued out, or copy of any writ be served upon, any peace officer, until seven days after notice in writing, given to or left for him at his place of abode, by the attorney for the party intending to commence such action; which notice shall contain the name and place of abode of the person intending to bring such action, and also of his attorney, and likewise the cause of action or complaint: And any peace officer may, at any time within seven days after any such notice, tender, or cause to be tendered, any sum of money, as amends for the injury complained of, to the party complaining, or to the attorney named in any such notice; and, if not accepted, the defendant may plead such tender in bar, together with the general issue, or any other plea, with leave of the court in which the action shall be commenced; and if, upon issue joined on such tender, the jury shall find the amends tendered to have been sufficient, they shall find a verdict for the defendant; and in such case, or if the plaintiff become nonsuit, discontinue, or judgment shall be given for the defendant upon demurrer, or if any action or suit shall be brought after the time limited, or shall be brought in any other place than as aforesaid, then the jury shall find for the defendant, and he shall be intitled to costs: But if the jury shall find that no such tender was made, or not sufficient, or against the defendant, they shall give the plaintiff such damages as they shall think proper; and the plaintiff shall recover costs.”

† And it is further enacted, “ That the defendant may plead the general issue, and give this act, and the special matter in evidence; and if a verdict shall be recorded for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action, after the defendant shall have appeared; or if judgment shall be given, upon a verdict or demurrer, against the plaintiff, the defendant shall recover treble costs.”

† Sect. 41. Provided, par. 41. “ That no person shall be convicted, for any of the before-mentioned offences, unless the prosecution be commenced within three days next after the offence committed.”

† Sect.

† *Sec. 45.* “ This act shall not extend to prejudice any right or custom of the city of London, or the practice there used, or any right or custom of any lord or lords of any leet, to set, inquire, and punish, the breach of assize of bread, or the right of any clerk of the market.”

General reservation of rights.

† *Sec. 46.* “ Nor to prejudice the ancient right or custom of the dean of Westminster, or the high steward of Westminster, and the liberties thereof, to set, ascertain, and appoint the assize and weight of all sorts of bread; but they may respectively set, ascertain, and appoint, according to the meaning of this act, the assize and weight of all sorts of bread which shall be made, sold, or exposed to sale, in Westminster, and the liberties thereof; and shall and may inquire and punish the breach of every such assize and weight of bread, as fully and freely in all respects, as they, or any of them have heretofore been accustomed to.”

Reservation of rights of Westminster, to set an assize of bread, within the city and liberty.

† *Sec. 47.* “ Nor to prejudice the right of Oxford or Cambridge, or of their clerks of the market, to set the assize and weight of all sorts of bread, &c.”

Oxford and Cambridge, to set an assize.

† *Sec. 48.* But the provisions of the foregoing statute of 31 Geo. 2. c. 29. being found defective, when an assize of bread is not set, it is accordingly enacted by 3 Geo. 3. c. 11. par. 1. “ That although no assize of bread shall be set in pursuance of the said act, no loaf called or deemed assize loaf in the tables of the assize and price of bread in the said act referred to, shall be made for sale, in any place where any loaf of the bread called or deemed prized loaf, in the said tables of the assize and price of bread, that is to say, no assize loaves of the price of three-pence, and prized loaves called half quartern loaves, nor assize loaves of the price of six-pence, and prized loaves called quartern loaves, nor assize loaves of the price of twelve-pence, and prized loaves called half peck loaves, nor assize loaves of the price of eighteen pence, and prized loaves called peck loaves, shall, at the same time, in any place be made for sale, sold, or carried out for sale, or be offered or exposed to or for sale, or allowed to be sold, on pain of forfeiting not exceeding forty, nor less than ten shillings.”

No assized and prized bread to be made at the same time in the same place.

† *Sec. 49.* And it is further enacted, par. 2. “ That the justices at any general or quarter session, or at any petty session, shall appoint which of the sorts of assize or prized loaves shall be allowed to be made and sold; and also what other sorts of bread, and grain, shall be allowed to be made and sold within their respective jurisdictions, or any part thereof; and every order which shall be so made, shall be entered in a book provided for that purpose, and in-

Quarter or petty session may appoint the sorts of assize or prized loaves, and what other bread shall be made.

A copy to be published.

Sorts of assize bread of wheat to be allowed.

Proportion as to weight, between the white and wheaten bread, and the wheaten and household assize bread.

The price in the peck loaf, and half peck, and its other subdivisions, in the wheaten, and in household bread.

The weight of the peck loaf, and its subdivisions, in every sort of bread; the time to be weighed before a justice, within 24 hours, and in other places

“ spested by the makers of bread for sale, in the day-time,
“ without fee; and after the making every such order, the
“ justices who shall make the same shall cause a copy to be
“ affixed up in some market or other publick town within the
“ division or place in which such order is to be observed; or
“ else shall cause a copy to be inserted in some public news-
“ paper published in the county or place, or some part there-
“ of in which every such order is to be observed.”

† *Stat.* 50. Provided, par. 3. “ That no justices shall
“ allow any sorts of assize bread made of the flour or meal of
“ wheat, other than wheaten and household bread, and loaves
“ of white bread of the price of two-pence, or under.”

† *Stat.* 51. And it is further enacted, par. 4. “ That
“ every maker of bread for sale shall observe the proportion
“ between white and wheaten bread, and wheaten and house-
“ hold assize bread, as to weight, as is mentioned in the said
“ assize tables; that is to say, every white loaf of the price of
“ two-pence, or under, shall always weigh three parts in four
“ of the weight of the wheaten loaf of the like price; and
“ every wheaten assize loaf of bread, of whatsoever price the
“ same shall be, shall always weigh three parts in four of the
“ weight of every household assize loaf of bread of the like
“ price; and that every household assize loaf of bread, of
“ whatever price the same shall be, shall always weigh one
“ third part more than every wheaten assize loaf of the like
“ price, on pain of forfeiting not exceeding forty shillings.”

† *Stat.* 52. And it is further enacted, par. 5. “ That
“ every peck, half peck, quarter of a peck, and half quarter
“ of a peck loaf, of the meal or flour of wheat, and called
“ wheaten bread, shall always be sold in proportion to
“ each other respectively, as to price; and that every peck,
“ half peck, quarter of a peck, and half quarter of a peck
“ loaf made for sale, of the meal or flour of wheat, and
“ called household bread, shall always be sold in proportion
“ to each other, and for one fourth less in price than the
“ loaf made for sale with the meal or flour of wheat, called
“ wheaten bread, of the same denomination, on pain of for-
“ feiting not exceeding forty, nor less than ten shillings.”

† *Stat.* 53. And it is further enacted, par. 6. “ That the
“ several loaves after mentioned, shall weigh in averdupois
“ weight as follows; that is to say, every peck loaf, seventeen
“ pounds six ounces; every half peck loaf, eight pounds ele-
“ ven ounces; every quarter of a peck loaf, four pounds
“ five ounces, and one half ounce; and every half quarter of
“ a peck loaf, two pounds two ounces and three quarters;
“ on pain of forfeiting not exceeding five shillings, nor less
“ than

“ than one shilling for every ounce wanting; and for less than one ounce, not exceeding two shillings and six-pence, nor less than six-pence; so as all such bread in any city, town corporate, borough, liberty, or franchise, or the jurisdiction thereof, or within the weekly bills of mortality, shall be brought before some justice and weighed, within twenty-four hours after the same shall have been baked, or found in any person's custody for sale, and elsewhere, within three days, unless it shall be made out, that such deficiency wholly arose from some unavoidable accident, or was occasioned by some contrivance or confederacy.”

within 3 days; unless deficiency be accounted for.

† *Stat.* 54. And it is further enacted, par. 7. “ That no person shall offer to sale any bread of an inferior quality to wheaten-bread, at an higher price than household bread, upon pain of forfeiting not exceeding twenty shillings.”

Bread inferior to wheaten, not to be sold higher than household.

† *Stat.* 55. And it is further enacted, par. 8. “ That on the said wheaten or household bread shall be imprinted a large Roman (W), and on household a large Roman (H), except loaves rasped by the desire of the person who shall order the same, on penalty of forfeiting not exceeding forty, nor less than ten shillings; unless it wholly arose from some unavoidable accident, or was occasioned by contrivance or confederacy.”

A large Roman (W) to be imprinted on all wheaten bread and a large Roman (H) on household.

† *Stat.* 56. And it is further enacted, par. 9. “ That every loaf made of any other grain than wheat, shall be marked with some letter or letters, not more than two, as the general or quarter session, or any petty session shall direct; which order shall be entered in some book which any maker of bread may peruse, without fee; and such justices shall cause a copy to be put up in some publick town within the division, or shall cause a copy thereof to be inserted in some publick newspaper published in the county; and if the justices shall neglect, then the maker of all such bread shall, in every place where no such order shall be made, cause every loaf of such bread to be marked with any two distinct capital letters as he shall think fit, (except loaves rasped by desire) on pain of forfeiting, not exceeding forty nor less than five shillings, for every loaf of such bread which shall not be so marked as herein before is first directed.”

Bread made of any other grain than wheat, to be impressed with such letters as the justices shall order.

An entry to be made free for inspection. Where the justices neglect to make such order, the maker is to make every such loaf with a distinct capital letters. Penalty.

† *Stat.* 57. And it is further enacted, by par. 10. “ That any justice, or peace officer by warrant of such justice, may enter any place belonging to any baker, to search, view, weigh, examine, and try, all or any bread which shall be there found; and if any bread shall on examination thereof, by any justice, or on the oath of one witness, be found de-

Justices, or peace officers may enter houses, and search, &c.

“ deficient

Bread found defective in the weight, or not marked, &c. may be seized.

“ ficient in weight, or not marked, or be deficient in the due
“ baking or working thereof, or be wanting in the goodness
“ of the stuff, or to have been made with any mixture of
“ meal or flour of any other grain than the same shall import
“ to be made with, or to be made with any other proportion
“ of grain, or to be made with any ingredient which ought
“ not to be put therein; or to be made with any thing in lieu
“ of flour, or that any such bread shall be made with any leaven
“ not allowed, every justice and officer as aforesaid, shall
“ seize such bread, and to dispose thereof to poor persons,
“ unless the default wholly arose from accident, or contrivance
“ or confederacy, upon pain of forfeiting not exceeding five
“ pounds, nor less than twenty shillings.”

Penalty of opposing.

† *Sec.* 58. And it is further enacted by par. 11. “ That
“ if any person shall in any wise oppose any search, view,
“ weighing, trying, or seizing of any bread, he shall forfeit
“ not exceeding forty, nor less than twenty shillings.”

No miller, mealman, or baker, may act as a justice.

† Provided, by par. 12. “ That no miller, mealman, or
“ baker, shall be allowed to act as a justice under this act,
“ on pain of fifty pounds, to whoever will inform or sue for
“ the same at Westminster, &c. or by way of summary complaint,
“ before the court of Session in Scotland.”

Default of servants.

† Provided, par. 13. “ That if any baker shall make
“ complaint to any justice, by the oath of one witness, that
“ any offence which shall have been occasioned by default of
“ any servant, every such justice may issue his warrant for
“ bringing such servant before any such justice, or any justice
“ of the county or place where the offender can be found,
“ and examine into the matter; and on proof upon oath, is
“ to adjudge and order what sum of money shall be paid to
“ his master or mistress, for the money he or she shall have
“ paid, by reason of the default of such servant; and if such
“ servant shall refuse on his conviction immediate payment,
“ then any such justice may cause every such servant to be
“ committed to the house of correction, or some other prison
“ of the county or place in which he shall be apprehended, to
“ be kept to hard labour, not exceeding one calendar month,
“ unless payment shall be made.”

Satisfaction.

Nonpayment.

Commitment.

Ante p. 499.
l. 37.

† *Sec.* 59. By the 14, 15, 16. parts of this statute, it is
enacted, “ That justices shall hear and determine the several
“ offences; and that the penalties and forfeitures shall be re-
“ covered, as by the before recited act 31 Geo. 2. c. 29. s.
“ 34. 35. 36. is therein directed.”

Ante p. 501.

† *Sec.* 60. By par. 17, 18, 19. “ No *certiorari* shall be
“ granted to remove any conviction or other proceedings had
“ thereupon

“ thereupon; and the like liberty of appeal is precisely given
 “ as by 31 Geo. 2. c. 29. f. 37, 38, 39.”

† *Sect.* 61. By par. 20, 21, 22. The same limitation of
 actions; protection to justices and officers, &c. costs, &c.
 is enacted in the precise words of 31 Geo. 2. c. 29. f. 40, 41.

† *Sect.* 62. And it is likewise enacted by par. 23. “ That
 “ no person shall be convicted under this act, unless the pro- Limitation of
 “ secution be commenced within three days; and that no per- prosecutions.
 “ son convicted upon this act, shall be subject or liable to be
 “ prosecuted for the same offence under any other law.”

† *Sect.* 63. By par. 24. The penalties and forfeitures
 are to be distributed, as directed by 32 Geo. 2. c. 18. (a), The (a) Ante p. 500.
 rights of the universities are saved in the same words as by
 31 Geo. 2. c. 29. f. 44, 45.

Sect. 64. But as by the foregoing acts of 31 Geo. 2.
 c. 29. and 3 Geo. 3. c. 11. two sorts of bread, made of
 wheat only, are allowed to be made for sale, viz. wheaten
 and household; it is enacted by 13 Geo. 3. c. 62. “ That of
 “ the flour of wheat, which flour, without any mixture or
 “ division, shall be the whole produce of the grain, the bran Standard wheat-
 “ or hull thereof only excepted, and which shall weigh three- en allowed.
 “ fourth parts of the weight of the wheat whereof it shall be
 “ made, may be at all times made and sold, and shall be cal-
 “ led A STANDARD WHEATEN BREAD.”

Sect. 65. And it is further enacted, par. 2. “ That the Weight, price,
 “ bakers shall mark every loaf thereof with the capital letters and proportions.
 “ S. W. and that the same may be sold although no assize of
 “ bread be set of the weight, and in the proportions follow-
 “ ing; that is to say, that every standard wheaten peck loaf
 “ shall always weigh 17 lb. 6 oz. avoirdupois, every half
 “ peck loaf 8 lb. 11 oz. and every quartern loaf 4 lb. 5 oz.
 “ and one half of an ounce avoirdupois; and that every peck
 “ loaf, half peck loaf, and quartern loaf, shall always be sold,
 “ as to price, in proportion to each other respectively; and
 “ that where wheaten and household bread, made as the law
 “ now directs, shall be sold at the same time, together with
 “ this standard wheaten bread, they be sold in respect of and
 “ in proportion to each other, as followeth; that is to say,
 “ that the same weight of wheaten bread as costs eight
 “ pence, the same weight of this standard wheaten bread shall
 “ cost seven pence, and the same weight of household bread
 “ shall cost sixpence, or seven standard wheaten assized loaves,
 “ shall weigh equal to eight wheaten assized loaves or to
 “ six

“ fix household affize loaves of the same price, as near
“ as may be.”

Standard wheat-
en not to be
fold as prized
loaves at one
time.

† *Señ. 66.* And it is hereby further enacted, par. 3.
“ That the said standard wheaten bread be not sold as prized
“ loaves, at one and the same time, together with affize
“ loaves of the same standard wheaten bread.”

Magistrates to
set the affize.

† *Señ. 67.* And it is further enacted, par. 4. “ That every
“ magistrate, or others authorized to set the affize and fix the
“ price of bread, are authorized to set the affize on, or fix
“ the price of the standard wheaten bread aforesaid, according
“ to the following table.”

The Affize Table.																	
Price of the bushel of wheat and bak- ing.		Small Bread.						Large Affize Bread.									
		Penny. Two Pence.						Sixpence.			Twelvepence.			Eighteen Pence.			
		s.	d.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.
2	9	25	4	3	2	9	9	7	11	18	15	5	28	7	0		
3	0	23	3	2	14	5	8	12	0	17	6	1	26	1	1		
3	3	21	6	2	10	12	8	0	5	16	0	11	24	1	0		
<hr/>																	
3	6	19	14	2	7	12	7	7	3	14	14	5	22	15	8		
3	9	18	9	2	5	1	6	15	4	13	14	7	20	13	11		
4	0	17	6	2	2	12	6	8	4	13	0	9	19	8	13		
<hr/>																	
4	3	16	6	2	0	11	6	2	2	12	4	4	18	6	7		
4	6	15	7	1	14	4	5	12	11	11	9	6	17	6	1		
4	9	14	10	1	13	4	5	7	13	10	15	10	16	7	7		
<hr/>																	
5	0	13	14	1	11	13	5	3	7	10	6	13	15	10	4		
5	3	13	4	1	10	8	4	15	7	9	14	4	14	14	5		
5	6	12	10	1	9	4	4	11	13	9	7	11	14	3	8		
<hr/>																	
5	9	12	1	1	8	3	4	8	9	9	1	1	13	9	10		
6	0	11	9	1	7	3	4	5	8	8	11	1	13	0	9		
6	3	11	2	1	6	4	4	2	12	8	5	8	12	8	3		
<hr/>																	
6	6	10	11	1	5	6	4	0	3	8	0	5	12	0	8		
6	9	10	5	1	4	10	3	13	13	7	11	9	1	9	6		
7	0	9	15	1	3	14	3	11	9	7	7	3	11	2	12		
<hr/>																	
7	3	9	9	1	3	3	3	9	8	7	3	1	10	12	9		
7	6	9	4	1	2	9	3	7	10	6	15	4	10	6	13		
7	9	9	0	1	1	15	3	5	13	6	11	0	10	1	7		
<hr/>																	
8	0	8	11	1	1	6	3	4	2	6	8	4	9	12	7		
8	3	8	7	1	0	14	3	2	9	6	5	2	9	7	11		
8	6	8	3	1	0	6	3	1	1	6	2	2	9	3	3		

Price

The Affixe Table continued.

Price of the bushel of wheat and bak- ing.			Small Bread.						Large Affixe Bread.											
			Penny.			Two Pence.			Sixpence.			Twelvepence.			Eighteen Pence.					
			s.	d.	cs.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.		
8	9		7	15		0	15	14		2	15	11		5	15	5	8	15	0	
9	0		7	12		0	15	7		2	14	5		5	12	11	8	11	0	
9	3		7	8		0	15	0		2	13	1		5	10	3	8	7	4	
9	6		7	5		0	14	10		2	11	14		5	7	13	8	3	11	
9	9		7	2		0	14	4		2	10	12		5	5	9	8	0	5	
10	0		6	15		0	13	14		2	9	11		5	3	7	7	13	2	
10	3		6	13		0	13	9		2	8	11		5	1	6	7	10	1	
10	6		6	10		0	13	4		2	7	12		4	15	7	7	7	3	
10	9		6	7		0	12	15		2	6	13		4	13	10	7	4	6	
11	0		6	5		0	12	10		2	5	15		4	11	13	7	1	12	
11	3		6	3		0	12	6		2	5	1		4	10	2	6	15	4	
11	6		6	1		0	12	1		2	4	4		4	8	9	6	12	13	
11	9		5	15		0	11	13		2	3	8		4	7	0	6	10	8	
12	0		5	13		0	11	9		2	2	12		4	5	8	6	8	4	
12	3		5	11		0	11	6		2	2	1		4	4	2	6	6	2	
12	6		5	9		0	11	2		2	1	6		4	2	12	6	4	2	
12	9		5	7		0	10	14		2	0	11		4	1	7	6	2	2	
13	0		5	6		0	10	11		2	0	1		4	3	0	6	0	4	
13	3		5	4		0	10	8		1	15	8		3	14	15	5	14	7	
13	6		5	2		0	10	5		1	14	14		3	13	13	5	12	1	
13	9		5	1		0	10	2		1	14	5		3	12	11	5	11	0	
14	0		4	15		0	9	15		1	13	13		3	11	9	5	9	6	
14	3		4	14		0	9	12		1	13	4		3	10	9	5	7	13	
14	6		4	13		0	9	9		1	12	12		3	9	8	5	6	5	

THE PRICE TABLE.

The Price Table.			The price of the bush- el of wheat and baking.	The Price Table.			The price of the bush- el of wheat and baking.
Prized Bread.				Prized Bread.			
Quar- tern Loaf.	HalfPeck Loaf.	Peck Loaf.		Quar- tern Loaf.	Halfpeck Loaf.	Peck Loaf.	
s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
0 2	0 5 ¹ / ₂	0 11	2 9	0 8 ¹ / ₂	1 5 ¹ / ₂	2 11	8 9
0 3	0 6	1 0	3 0	0 9	1 6	3 0	9 0
0 3	0 6 ¹ / ₂	1 1	3 3	0 9 ¹ / ₂	1 6 ¹ / ₂	3 1	9 3
0 3 ¹ / ₂	0 7	1 2	3 6	0 9 ¹ / ₂	0 7	3 2	9 6
0 3 ¹ / ₂	0 7 ¹ / ₂	1 3	3 9	0 9 ¹ / ₂	0 7 ¹ / ₂	3 3	9 9
0 4	0 8	1 4	4 0	0 10	0 8	4 4	10 0
0 4 ¹ / ₂	0 8 ¹ / ₂	1 5	4 3	0 10 ¹ / ₂	1 8 ¹ / ₂	3 5	10 3
0 4 ¹ / ₂	0 9	1 6	4 6	0 10 ¹ / ₂	1 9	3 6	10 6
0 4 ¹ / ₂	0 9 ¹ / ₂	1 7	4 9	0 10 ¹ / ₂	1 9 ¹ / ₂	3 7	10 9
0 5	0 10	1 8	5 0	0 11	1 10	3 8	11 0
0 5 ¹ / ₂	0 10 ¹ / ₂	1 9	5 3	0 11 ¹ / ₂	1 10 ¹ / ₂	3 9	11 3
0 5 ¹ / ₂	0 11	1 10	5 6	0 11 ¹ / ₂	1 11	3 10	11 6
0 5 ¹ / ₂	0 11 ¹ / ₂	1 11	5 9	0 11 ¹ / ₂	1 11 ¹ / ₂	3 11	11 9
0 6	1 0	2 0	6 0	1 0	2 0	4 0	12 0
0 6 ¹ / ₂	1 0 ¹ / ₂	2 1	6 3	1 0 ¹ / ₂	2 0 ¹ / ₂	4 1	12 3
0 6 ¹ / ₂	1 1	2 2	6 6	1 0 ¹ / ₂	2 1	4 2	12 6
0 6 ¹ / ₂	1 2	2 3	6 9	1 0 ¹ / ₂	2 1 ¹ / ₂	4 3	12 9
0 7	1 0 ¹ / ₂	2 4	7 7	1 1	2 2	4 4	13 0
0 7 ¹ / ₂	1 2	2 5	7 3	1 1 ¹ / ₂	2 3	4 5	13 3
0 7 ¹ / ₂	1 3	2 6	7 6	1 1 ¹ / ₂	2 3 ¹ / ₂	4 6	13 6
0 7 ¹ / ₂	1 3 ¹ / ₂	2 7	7 9	1 1 ¹ / ₂	2 4	4 7	13 9
0 8	1 4	2 8	8 0	1 2	2 4	4 8	14 0
0 8 ¹ / ₂	1 4 ¹ / ₂	2 9	8 3	1 2 ¹ / ₂	2 4 ¹ / ₂	4 9	14 3
0 8 ¹ / ₂	1 5	2 10	8 6	1 2 ¹ / ₂	2 5	4 10	14 6

† *Sec. 68.* And it is enacted par. 5. “ That all persons
 “ selling the said bread, shall be liable to the penalties, as they
 “ are liable to by the laws now in being, for any misdemea-
 “ nor or neglect, in respect to making, marking, selling, or
 “ exposing to or for sale, wheaten or household bread.”

Penalties.

† *Sec. 69.* Provided, par. 6. “ That if any information
 “ shall be laid against any baker for making, marking, baking,
 “ or exposing to or for sale, any bread, purporting to be the
 “ standard wheaten bread aforesaid, made of flour, not being
 “ the whole produce of the wheat, the bran or hull thereof
 “ only excepted, and weighing three fourth parts of the weight
 “ of the wheat whereof it was made, and such baker shall
 “ prove that he bought the said flour, as and for such flour as
 “ aforesaid, of the miller or mealman, naming his name and
 “ place of abode; the baker shall stand clear and acquitted,
 “ and the miller or mealman shall pay the penalties of adulte-
 “ rating corn, meal, or flour, by 31 Geo. 2. c. 5, 6.”

The miller or
 mealman selling
 adulterated
 flour, shall for-
 feit the penalties
 directed by act
 31 Geo. 2.

† *Sec. 70.* And it is further enacted by par. 7. “ That
 “ when any magistrate, shall have set an affize on or fixed the
 “ price of the said standard wheaten bread, they may omit the
 “ setting an affize upon, or fixing the price of any other sort
 “ of bread.”

An affize on the
 price of stan-
 dard wheaten
 bread, fixed,
 the price of any
 other sort may
 be omitted.

† *Sec. 71.* And it is further enacted by par. 8. “ That
 “ the justices at any general or quarter-session may prohibi-
 “ bit for three months, unless they shall see cause sooner to re-
 “ voke the order for such prohibition, at any adjourned quar-
 “ ter, or special sessions makers from making for sale, any other
 “ sorts of bread, of a superior quality, and sold at a higher
 “ price than the standard wheaten bread: provided, that no
 “ such order for such prohibition be in force, until one calen-
 “ dar month after the date thereof; and every order shall be
 “ entered in a book, to be inspected by the makers without pay-
 “ ing any fee: And after the making every such order the
 “ justices shall cause a copy to be affixed in some market, or
 “ other public town, within the division, or inserted in some
 “ public newspaper, published in the county, or place.”

Quarter sessions
 may prohibit,
 for 3 months,
 other bread than
 standard wheat-
 en.

† *Sec. 72.* Provided, par. 9. “ That within London,
 “ and the liberties thereof, the company of bakers, and in any
 “ other place, any baker may offer all such objections as such
 “ company of bakers think fit against such prohibition at the
 “ time when such justices shall have under consideration the
 “ ordering such prohibition as aforesaid.”

Company of ba-
 kers of London,
 &c. may offer
 objections.

† *Sec. 73.* Provided par. 10. “ That nothing shall pre-
 “ vent the magistrates and others, who are authorized to set
 “ an affize on bread, from allowing any white loaves or
 “ wheaten

Wheaten loaves
 of the price of
 1d. or 2d. may
 be made.

“ wheaten loaves of the price of one penny, or two pence, to
 “ be made and sold according to the table contained in 31 Geo.
 “ 2. f. 10.”

No assize on
 coarser bread,
 at a lower price.

† *Stat.* 74. And whereas there may be many places where
 the inferior classes are used to bread made of wheat, of a
 coarse and cheaper sort than the standard wheaten bread, be it
 hereby further enacted by par. 11. “ That any baker may
 “ make such inferior bread, provided he sell at a price under
 “ that of the household bread, as directed by 31 Geo. 2.”

Bread coarser
 sold at the as-
 sised household
 bread price, li-
 able to penal-
 ties.

† *Stat.* 75. And it is further enacted, by par. 12. “ That
 “ when and where any baker shall sell such inferior bread by
 “ weights and prices whereat the household bread aforesaid is
 “ at that time assized, or priced, or sold, he shall be liable to
 “ the same as bakers are now by law liable to for any of the
 “ like misdemeanors.”

Powers of the
 magistrates.

† *Stat.* 76. And it is further enacted, par. 13. “ That
 “ every magistrate shall have all powers relative to assizing,
 “ pricing, and regulating the standard wheaten bread and
 “ punishing as they have by any law now in being relative to
 “ any bread whatsoever.”

No composition
 to be used

† *Stat.* 77. Thirdly, As to ALE AND BEER. It is enacted by
 1 Will. 3. sess. 1. c. 24. f. 17. “ That no common brewer,
 “ or retailer of ale or beer, shall use therein any molasses,
 “ coarse sugar, or any composition or extract thereof, on
 “ pain of forfeiting the said liquor, and also 100 l. half to
 “ the king, and half to the prosecutor, if sued for in six
 “ months.”

Penalty.

† *Stat.* 78. And it is enacted by 10 & 11 Will. 3. c. 21.
 f. 34. “ That if any common brewer or retailer shall com-
 “ mit the said offence, or shall receive into his custody any
 “ quantity of the said materials exceeding ten pounds, he
 “ shall forfeit 100 l. to be recovered and mitigated by the
 “ laws of excise, and the servant or assistant therein 20 l.
 “ in like manner, and in default of payment shall be im-
 “ prisoned three months.”

† *Stat.* 79. And it is further enacted by 9 Ann. c. 12.
 par. 24. 26. “ That no common brewer, innkeeper, or vic-
 “ tualler, shall use any broom, wormwood, or other bitter
 “ ingredient (to serve instead of hops) in any beer or ale for
 “ sale (except infusing the same after it is brewed and tunned,
 “ to make broom or wormwood ale or beer) on pain of 20 l.
 “ half to the prosecutor, &c. to be levied by the laws of
 “ excise.”

† *Stat.*

† *Stat.* 80. And it is further enacted by 12 Ann. stat. 1. c. 2. "That no common brewer or retailer of beer or ale, shall use any sugar, honey, foreign grains, Guinea pepper, essentia bina, cocculus Indicus, or any unwholesome ingredients, in the brewing of ale or beer, or mix any of them therewith, on pain of 20*s.* to be distributed, recovered and mitigated as aforesaid."

N. B. As to enhancing the price of ale, &c., vide 2 and 3 Edw. 6. c. 15. and 2 Geo. 3. c. 14. before recited.

† *Stat.* 81. And it is enacted by 8 Eliz. c. 9. "That magistrates both in counties and in corporations, shall fix the price of all ale and beer vessels yearly, at their Easter sessions."

† *Stat.* 82. And it is further enacted by 12 Car. 2. c. 24. f. 34. and 1 Will. 3. ft. 1. c. 24. f. 5. "That within the bills of mortality every barrel of beer shall contain 36 gallons, and every barrel of ale 32 gallons, and that in all other places every barrel of ale or beer shall measure 34 gallons."

† *Stat.* 83. And it is further enacted by 11 & 12 Will. 3. c. 15. "That all retailers of ale and beer shall retail the same by a standard measure, to be marked by a magistrate, upon penalty of any sum between 10*s.* and 40*s.* and if they refuse to specify the quantities sold, they shall lose the privilege of detaining the goods of their guests in satisfaction of the reckoning."

Vide Blacketby's 10. 1 Burn's Justice 39

† *Stat.* 84. And it is further enacted by 1 Will. & Mary, sess. 1. c. 22. "That ale, beer, cyder and mum, may be exported upon paying the duties." But by 2 Geo. 3. c. 14. which recites the above act of Will. 3. "If any merchant or master of any ship or vessel, or other person, shall cause or suffer any of the said liquors, so exported as merchandise, to be unshipped, unladen, or laid on land, or put into any other ship or vessel within Great Britain, they shall forfeit the same, and also 50*l.* for every cask of such respective liquors so unshipped, &c." (1)

(1) N. B. For the extise and other regulations respecting ale, beer, cyder, perry, sherry, mead, thegin, meads, sweets, verjuice, and vinegar, vide 2 Burn's Justice, p. 38 to 46.

† *Stat.* 85. As to the article of BUTTER and CHEESE, it is recited by 13 and 14 Car. 2. c. 26. That as butter is one of the principal commodities of the product of this kingdom, and is not only of universal use at home, but that great quantities are exported, it is thereupon enacted, "That every kilderkin of butter shall contain 112 lb. every firkin 56 lb. and

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"every

“ every pott 14 lb. reckoning 16 ounces to the pound, and
 “ exclusive of the tare of the kilderkin, firkin, or pott; that
 “ new and old butter shall not be mixed; nor any whey
 “ butter packed or mixed with butter made of cream, but
 “ that every package shall contain the same quality through-
 “ out; that no butter shall be salted with any great salt, nor
 “ more small salt mixed with it than is necessary for its pre-
 “ servation, on pain of forfeiting the same, and six times the
 “ value of every different pound of butter.”

By 12 Car. 2.
 c. 2. s. 9. No
 butter or cheese
 to be imported
 from Ireland.

† *Stat.* 86. And it is further enacted, par. 3. “ That no
 “ persons whatsoever shall repack for sale any butter upon
 “ pain of double the value. And whoever shall pack butter,
 “ shall pack his butter into good and sufficient casks, &c.
 “ and shall set upon every firkin and cask when the same is
 “ thoroughly seasoned in water, a continuing visible mark of
 “ the just weight of the empty cask, and when filled with
 “ butter the first letter of his christian and surname at length,
 “ with an iron brand; on pain of 10 s. for every cwt. of
 “ butter, and so in proportion, for a greater or less quantity.
 “ And every potter shall set upon every pott which he shall
 “ make for the packing of butter, the just weight of such
 “ pott when burnt, and his christian and surname as aforesaid,
 “ on pain of one shilling for every pott he shall omit so to
 “ mark; and every farmer or packer of butter, two shillings
 “ for every pott he uses so omitted to be marked, one half to
 “ the poor, the other to the prosecutor, to be recovered by
 “ action of debt, indictment, information, or presentment,
 “ (if commenced within four months after the sale) either in
 “ the sessions of the peace, or in the court of record of the
 “ place where the offence is committed.”

† *Stat.* 87. And it is further enacted by 4 Will. & Mary,
 c. 7. “ That after the factor or buyer hath bought and con-
 “ tracted for the said commodity, and approved by searching
 “ and weighing the same, if he think fit, the seller shall not
 “ be liable to any of the penalties above specified, but that the
 “ said factor, or buyer, shall mark the said butter, or the
 “ cask wherein it is, and in case the same shall be afterwards
 “ exchanged or opened, the cask changed, or any bad butter
 “ mixed with good butter, or any other fraud be committed
 “ by the seller, the offender, on conviction by one witness
 “ before one justice, shall forfeit 20 s. for every such firkin
 “ and offence.”

† *Stat.* 88. And to the end the trade for butter and cheese
 may not be engrossed by particular persons, it is enacted,
 “ That every warehouse-keeper, weigher, searcher, or ship-
 “ per of butter and cheese, at any port or place in this king-
 “ dom, shall receive all butter and cheese brought to them
 “ for

“ for any of the cheesemongers free of the city of London,
 “ or other person making the said commodities, and shall take
 “ care and ship the same, without preference on the next
 “ vessel for London, unless the owners order the contrary, at
 “ the rate of 2*s.* 6*d.* a load, and no more, on pain of 10*s.*
 “ for every firkin of butter, and 5*s.* for every wey of cheese.
 “ And the said weigher shall keep a book of receiving and
 “ shipping the same, &c.” (2)

(2) By 3 Hen. 6. c. 4. 18 Hen. 6. c. 3. Butter and cheese may be exported to any place.—By 6 Hen. 6. c. 8. The way of cheese shall be of a certain weight.—By 2 Ph & Mary, c. 5. 13 Eliz. c. 25. f. 2*b*. A licence is to be granted on the exportation.—By 21 Jac. 1. c. 22. Justices may restrain the purchasing of them.—By 32 Car. 2. c. 2. f. 9. The importation of foreign butter and cheese is restrained.—By 8 Geo. 1. c. 27. The packing of butter in the city of York is regulated.—By 17 Geo. 2. c. 8. The same at New Malton.—By 13 Geo. 3. c. 5. f. 2. Cheese may be imported for a limited time, duty free.

† *Sec.* 89. Fifthly, As to CATTLE, &c. It is enacted by 31 Geo. 2. c. 40. f. 11. “ That no salesman or other broker
 “ or factor who shall be employed to buy or sell any sort of
 “ cattle for others, by commission, or for reward to be paid,
 “ or taken by himself or any servant or agent, shall directly or
 “ indirectly, for his own account, buy any live ox, bull,
 “ cow, steer, bullock, heifer, calf, sheep, lamb, or swine,
 “ in London, or within the bills of mortality, or at any place
 “ while any such cattle shall be on the road, or be driving,
 “ bringing, or coming up, or offered to or for sale in Lon-
 “ don, or within the bills of mortality (other than such cat-
 “ tle which any such salesman, broker, or factor shall actually
 “ purchase for the necessary use or provision of his family,
 “ and shall actually use accordingly), and that no such sales-
 “ man, broker, or factor, shall sell or expose, or offer to or
 “ for sale on his own account, in London, or within the
 “ bills of mortality, either by himself, or his servant or agent,
 “ any live ox, bull, cow, steer, bullock, heifer, calf, sheep,
 “ lamb or swine, upon pain, on every conviction, of forfeiting
 “ double the value of any live cattle which he shall so buy or
 “ sell on his own account; provided the prosecution be com-
 “ menced within three days after the offence committed.”

† *Sec.* 90. “ On complaint made on oath, the justice of
 “ the district is to summon, &c. the offender and the wit-
 “ nesses, and, on the parties appearing or not appearing, there-
 “ upon is to proceed to hear the complaint in a summary
 “ way, and on such payment of the forfeiture on conviction,
 “ is to issue his warrant for the levying thereof by distress and
 “ sale, and for want of distress, to commit the offender for
 “ any time not exceeding one month, nor less than ten days,
 “ unless payment be sooner made. And a witness refusing
 “ to be examined, may be committed not exceeding ten days.
 “ Appeal may be made by the seller if aggrieved, to the
 “ quarter sessions, on giving security and notice, and the de-
 “ termination of the sessions to be final.”

† *Sec.* 91. Sixthly, As to FISH I shall examine the size and preservation of them. 2. The rules for fishing in and near the sea. 3. Their importation.

Vide 1 Inst. 200

† *Sec.* 92. It is said that fish ponds, or waters wherein fish are kept and nourished, being a matter of profit and tending to the increase of victuals any man may of common right erect them; and it is therefore provided by 3 *Edw. 1. c. 20.* “That if any be attainted at the suit of the party of trespassing in parks or ponds, great and large amends shall be awarded, the offender suffer 3 months imprisonment, make fine at the discretion of the court, and find surety not to offend again, &c.

(a) As it is not said who shall have the fish, they are forfeited to the king. 2 Burn 321.

† *Sec.* 93. As to the first particular, it is enacted by 1 *Geo. 1. st. 2. c. 18. s. 14.* “That no person shall cause any thing to be done in the Severn, Dee, Wye, Teame, Tees, Ribble, Mersey, Dun, Air, Ouse, Swaile, Calder, Wharf, Eure, Darvent, or Trent whereby the spawn of any salmon, or any salmon not 18 inches from the eye to the extent of the middle of the tail shall be taken or killed. Or shall set any thing across the said rivers whereby the salmon may be hindered from passing up to spawn. Or shall from 31 July to 12 November (except in the Ribble, where they may be taken between the 1 Jan. and 15 Sep.) take any salmon of any kind; or shall after every 12th November fish there for salmon with any net less than 2½ inches in the mesh, on pain of forfeiting the fish, (a) nets, and 5 l. on conviction, within one month, on view, confession, or one witness by distress: and to be distributed half to the informer and half to the poor, on default hard labour for any term between one and three months and such other corporal punishment as the justice shall think fit.

† *Sec.* 94. And it is further enacted, par. 15. “That no salmon out of the said rivers shall be sent to London under 6 lb. weight, on pain that the sender, buyer, and seller shall forfeit 5 l. and the fish, to be levied and distributed on conviction as aforesaid, or to suffer imprisonment as aforesaid for three months unless sooner paid. But by s. 17. an appeal may be to the next sessions.”

† *Sec.* 95. And it is enacted by 13 *Edw. 1. st. 1. c. 47.* “That no salmon shall be taken in any water where salmon are taken between 8th September and the 11th of November, nor shall any young salmon be taken at mill pools (by 13 *Rich. 2. s. 1. c. 19.*) in any other places from *Mid April* to Midsummer, on pain of having the nets and engines burnt, for the first offence, for the second imprisonment for a quarter

“ quarter of a year, for the third a whole year, and so on as
 “ the trespasss shall increase; and overseers shall be assigned (a) (a) 2 Inst. 477.
 “ to inquire of the same.”

† *Secl.* 96. And it is further enacted by 13 Rich. 2. ft. 1.
 c. 19. “ That no persons shall put into any waters at any
 “ time of the year any nets called *stalkers*, nor any other en-
 “ gines whatever by which the fry or breed of salmons, lamp-
 “ reys or any other fish may be destroyed, on pain as afore-
 “ said.—And all waters in *Lancashire* shall be put into defence
 “ as to taking of salmon from Michaelmas to Candlemas and
 “ in no other time of the year.”

† *Secl.* 97. And it is enacted by 17 Rich. 2. c. 19. “ That
 “ the justices of peace, and the lord mayor of London on the
 “ Thames and Medway, shall survey the offences in both the
 “ acts last above mentioned, and shall survey and search all
 “ the wears in such rivers, that they shall not be very straight
 “ for the destruction of such fry and brood, but a reasonable
 “ wideness after the old assize used and accustomed, and they
 “ shall appoint under conservators who shall be sworn to make
 “ like survey, search and punishment, and they shall enquire
 “ in sessions as well by their office, as at the information of
 “ the under conservators of all defaults aforesaid, and shall
 “ cause them which shall be thereof indicted to come before
 “ them, and if they be thereof convicted, they shall have im-
 “ prisonment and fine at the discretion of the justices; and
 “ if the same be at the information of an under conservator
 “ he shall have half the fine.”

† *Secl.* 98. It is enacted by 1 Eliz. c. 17. made perpetual
 by 3 Car. 1. c. 4. “ That no person of whatever estate, de-
 “ gree or condition, by any ways or means whatsoever shall
 “ take and kill any young brood, spawn or fry of eels, salmon,
 “ pike, or of any other fish, nor shall take or kill any salmons
 “ or trouts not being in season, nor any pike or pikerel not
 “ being in length 10 inches or more; nor any salmon not be-
 “ ing in length 16 inches or more; nor any trout not being
 “ in length 8 inches or more; nor any barble not being in
 “ length 12 inches or more, nor shall any fish be taken with
 “ any manner of net or by any other engine or device what-
 “ soever but only with a net or trammel whereof every mesh
 “ or mark shall be two inches and a half broad, angling ex-
 “ cepted.”

Whether the
 penalty is 20 l.
 or 20 s. for this
 offence. Vide
 2 Burn's Justice
 323.

† “ But it is provided that such nets and other engines as
 “ have been used for the taking of smelts, loches, minnows,
 “ bullheads, gudgeons or eels may still be in all such places
 “ where such fish have been used to be taken and killed, so that

“ such persons do not take, kill or destroy with such nets any other fish contrary to the meaning of this act.”

† The lord admiral of England. The mayor of London. “ The lord of every leet in England or Wales, or in default of being presented at the leet, the justices of assize, &c. and all persons lawfully intitled to have any conservation of rivers, streams or waters, are impowered to enquire into offences against this act by the oaths of 12 men or more, and to hear and determine the same within their respective jurisdictions, and all fines, &c. resulting from the several convictions; shall be to the use of such persons as heretofore lawfully had or were intitled to the same.”

† *Stat. 99.* And it is further enacted by 33 Geo. 2. c. 27. “ That no person shall take, or knowingly have in his possession either in the water or on shore, or sell, or expose to sale any spawn, fry or brood of fish, or any unsizable fish, or fish out of season, or any smelt not 5 inches long. And any person may seize the same together with the baskets and pack-ge, and charge a constable or other peace officer with the offender and with the goods, and shall carry them before a justice, and on conviction before such justice, the same shall be forfeited and delivered to such prosecutor, and the offender shall besides forfeit 20 s. half to prosecutor and half to the poor where the offence is committed, on default, by distress, to be committed to hard labour not exceeding 3 months unless sooner paid. But the justice may remit any portion equal to or within one half of the said penalty.”

† *Stat. 100.* And by 2 Hen. 6. c. 15. “ If any person shall fasten any nets over rivers, to stand continually day and night he shall forfeit 5 l.”

† *Stat. 101.* As to the second particular. And it is further enacted by 3 Jac. 1. c. 12. “ That any person who shall erect any new wear along the sea shore or in any haven, harbour or creek or within 5 miles of the mouth thereof, or shall take spoil or destroy any spawn, fry or brood of any sea fish in any device whatsoever, shall forfeit 10 l. for every offence, half to the king, half to the informer; and if any person shall within the distance of the places aforesaid fish with any draw net or drag net under three inches mesh, viz. one inch and a half from knot to knot except for the taking of smoulds in Norfolk only, or with any net with canvass or other engine or device whereby the spawn, fry or brood of sea fish may be destroyed, shall forfeit the net and 10 s. to be levied by distress. But it is provided that nothing in this act shall restrain the taking of herrings, pilchards, sprats or
“ lavidarian

“laviderian with nets of a lesser mesh, and further that it shall not extend to Anglesea.” (3)

(3) For the preservation of fish in the Severn. See 30 Car. 2. st. 1. c. 9. a private act.

† *Stat.* 102. And by 1 Geo. 1. st. 2. c. 18. “Whoever shall use at sea upon the English coast, any haul net, drag net, or set net for catching any fish, except herrings, pilchards, sprats or laviderian, of less than three inches and a half mesh, from knot to knot; or which hath a false or double bottom; or shall put one net behind another; he shall, on conviction before one justice, on the oath of two witnesses, in one month after the offence forfeit the same and 20 l. half to the informer and half to the poor, by distress, and for want of sufficiency to be committed for 12 months, and the nets to be burnt. But an appeal may be made to the next session.”

† *Stat.* 103. It is also enacted by the said statute 1 Geo. 1. st. 2. c. 18. “That if any person shall bring to shore or expose to sale any fish less than the following sizes from the eyes to the extent of the tail, viz. Brett or turbot 16 inches, brill or pearl 14. Codlin 12. Whiting 6. Bass and mullet 12. Sole, plaice and dab 8. Flounder 7. he shall forfeit the fish to the poor and 20 s. half to the informer and half to the poor, to be levied as aforesaid, and for default or insufficiency to be severely whipped and kept to hard labour from 6 to 14 days. Appeal to next sessions.”

† *Stat.* 104. But it is enacted by 33 Geo. 2. c. 2. “That brett, turbot, brill or pearl, although under the said dimensions, may be exposed to sale so as the same be not sold by retail for above 6 d. per pound; and if any greater price shall be demanded or taken; or such fish shall not be weighed or measured if required, the same shall be forfeited and the offender shall pay 20 s. to be recovered, &c. as before directed. And the money paid for the purchase of such fish shall be returned to the party.”

† *Stat.* 105. It is enacted by 9 Geo. 2. c. 33. s. 4. “That no person shall take, kill or destroy any lobsters on the coast of Scotland from the 1st of June, to the 1st of September, on pain of 5 l. on conviction, before two justices, of the shire on the coast where the offence shall be committed.” (4)

(4) For further particulars relating to the price of fish within the bills of mortality. Vide 10 and 21 Will. 3. c. 24. s. 11. 9 Ann c. 26. 21 Geo. 2. c. 49. 29 Geo. 2. c. 39. 30 Geo. 2. c. 21.

† *Stat.* 106. As to the third particular respecting the importation of fish, it is enacted by 18 Car. 2. c. 2. "That if any ling, herring, cod or pilchard, salmon, eels or congers, taken by foreigners shall be imported or exposed to sale, any person may seize the same, to be divided equally between the informer and the poor."

† *Stat.* 107. And it is further enacted, by 1 Geo. 1. c. 18. and 9 Geo. 2. c. 33. "That no fish taken by or received of any foreigner, except protestants inhabiting in England shall be imported (except eels, stockfish, anchovies, sturgeon, botarge or caveas, lobster, and turbot) on pain of 100 l. and the master of the vessel 50 l. half to the poor and half to the informer who shall sue in 12 months in any of the courts at Westminster." (5)

(5) For the law respecting the salting of fish. Vide 2 Burn's Justice, 112 to 128. and for the British herring fishery. Vide 28 Geo. 2. c. 14.

† *Stat.* 108. Seventhly, As to BACON and PORK, it is enacted, by 18 Car. 2. c. 2. "That if any beef, pork, or bacon, for sale, shall be imported, they may be seized, and shall be forfeited, one half to the poor, and the other to the person who shall seize the same: and by the 20 Car. 2. c. 7. those who shall seize the same are indemnified."

† *Stat.* 109. And it is further enacted, by 12 Car. 2. c. 4. f. 11. "That when beef, pork, and bacon, do not exceed, viz. beef, 5 l. the barrel, pork 6 l. 10 s. the barrel, and bacon 6 d. a pound in price, at the ports from whence they are laden; and at the time of their lading, the same may be shipped, carried out, and exported."

† *Stat.* 110. And by 22 Car. 2. c. 13. f. 4. "Beef, pork, and bacon, may be exported by native or foreigner, although the same do exceed the prices above mentioned at the ports, &c. at the time of their lading."

† *Stat.* 111. And it is further enacted, by 3 Will. and Mary, c. 8. "That all sorts of beef, pork, or hogs flesh, may be exported into any part of the world in amity with the Crown, free from any custom or imposition whatsoever."

† *Stat.* 112. By 4 Will. and Mary, c. 5. f. 2. "Four pence shall be paid for every pound of bacon imported."

Vide 3 and 4 Will. and Mary c. 8.

† *Stat.* 113. By 5 Will. and Mary, c. 2. f. 4. "The said sum shall be paid from the first day of the session."

† *Stat.*

† *Stat. 114.* And by 3 Geo. 2. c. 20. s. 16. "Beef or
" pork salted with foreign salt shall receive on exportation
" 1 s. 6 d. per barrel."

† *Stat. 115.* Eighthly, As to HAY and STRAW, it is enacted, For the regula-
tion of the hay-
market at West-
minster Vide
8 and 9 Will. 3.
c. 17.
by 2 Will. and Mary, sess. 2. c. 8. s. 16. "That every
" truss of old hay brought or offered to be sold within the bills
" of mortality, between 1 August and 1 June, shall contain
" and be the full weight of 56 lb. at least; and that every
" truss of hay brought, or offered to be sold, as aforesaid, be-
" tween 1 June and 1 August, being new hay of that sum-
" mer's growth, shall be and contain the full weight of 60 lb.
" and old hay of any former year's growth the weight of
" 56 lb. as aforesaid; and if any hay shall be brought, or
" offered to be sold, as aforesaid, whereof any truss shall be
" of less weight than aforesaid, the person so bringing or of-
" fering such hay to be sold, shall forfeit for every truss, not
" being the full weight, eighteen pence."

† *Stat. 116.* And it is further enacted, by 31 Geo. 2. c. 40.
" That all straw which shall be sold or delivered in, or
" brought to, or exposed to sale in London, or within the
" bills of mortality, shall be sold and delivered in bundles or
" trusses, firmly bound up, and of the full weight of 36 lb.
" of good and sound straw, exclusive of any other thing
" which shall be put therein; and whoever shall bring into,
" or expose to sale, in London, or within the bills of morta-
" lity, or in any place within the distance of thirty miles
" from the extent of any part of the limits of the said bills of
" mortality, when straw shall be sold in bundles or trusses,
" any bundle or truss of straw which shall be of less weight
" than 36 lb. of good and sound straw, or which shall be in
" the inside of a different quality or goodness from which on
" the outside it shall appear to be, shall forfeit twenty pence
" for every offence, and the sum of one shilling for every
" bundle or truss of straw."

† *Stat. 117.* And it is further enacted by said statute, par. 2.
and 3, "That every truss of hay shall be made up in like
" manner as the straw aforesaid, and that such hay only as
" shall be good, shall be deemed and taken to be the hay
" which is to make up the weight every truss of hay by law
" ought to be; and also that the pair of bands with which
" any truss of hay shall be bound, shall not exceed the weight
" of 5 lb. upon pain of forfeiting for every offence one shil-
" ling."

† *Stat. 118.* And it is further enacted by par. 4. "That
" whoever shall bind hay contrary to the directions of this
" act, shall forfeit three pence for every bundle or truss of
" hay

" hay or straw, if objected to within twenty-four hours by
" the proprietor."

M. B. For the regulation of the markets with respect to the sale of these articles. Vide the 6, 7, 8, 9 and 10 sections of the act.

† *Sec.* 119. And it is further enacted by par. 5. " That
" no person who shall act as a common salesman in selling
" hay or straw for any other person for gain or reward, or by
" commission in London, or within the bills of mortality,
" shall directly or indirectly buy any hay or straw on his own
" account, other than what he shall purchase to spend for his
" own use; and if any such person shall buy any hay or straw
" on his own account to sell again, or shall sell in London,
" or within the bills of mortality, any hay or straw which
" shall have been brought by him on his account shall forfeit
" one shilling for every truss."

† *Sec.* 120. Ninthly, As to FRUIT, it is enacted, by 1 Ann, stat. 1. c. 15. s. 1. " That the measure commonly called
" water measure shall be round, and in diameter 18 1-half
" inches within the hoop, and 8 inches deep, and no more,
" and so in proportion for any greater or lesser measure; and
" that every such measure, by which apples and pears are sold,
" shall be heaped as usually; and that whoever shall buy or
" sell apples or pears by or with any other measure, shall forfeit ten shillings for every offence, half to the informer,
" and half to the poor, on conviction by one witness, before
" one magistrate, to be levied by warrant of distress. But
" this act shall not extend to measures sealed and allowed
" by the company of fruiterers of London, which are used in
" the said city, or within three miles thereof."

M. B. By 8 Geo. 2. c. 20. there was an additional duty of 2 s. a bushel continued for 7 years. By 11 Geo. 1. c. 7.

† *Sec.* 121. And it is further enacted by 10 Geo. 2. c. 27. " That upon all apples imported into Great Britain shall be
" paid, over and above the duties already imposed, an additional duty of two shillings a bushel, and so for any greater
" or less quantity, to be paid down in ready money by the importers at the time of landing the same, which duty shall be
" applied in the like manner as other duties upon the same
" article."

† *Sec.* 122 Tenthly, As to HONEY AND WAX, it is enacted, by 23 Eliz. c. 8. " That whoever, in the making and melting of wax, shall mix or mingle the same with rosin, tallow, turpentine, or any other deceitful thing, to the intent to sell the same, or to offer the same to be sold or uttered for wax, shall forfeit the same; and if the same shall happen to be sold before the corruption is discovered, the melter, mingler, or corrupter, or the causer or procurer thereof, shall forfeit for every lb. 2 s. half to the queen, half to the party detected, if he will sue for it, or any other person that will sue for the same in any of the queen's courts of record,"

† *Sec.*

† *Stat.* 123. And it is further enacted, par. 2. " That every melter and maker up of unwrought wax shall have a stamp of the breadth of sixpence, wherein two letters shall be plainly graven, signifying his name and surname, with which every piece of wax shall be printed or stamped triangle in three places, upon the outside of the upper part of every piece so melted and cast, on pain to forfeit the value of every piece of cake sold, or offered to be sold, and not so stamped or marked."

† *Stat.* 124. And it is further enacted, par. 3. " That whoever shall melt, mix, work, or sell any wrought wax, or any stuff or wares wrought with wax, shall have a stamp or seal set to his work, that it may be known who were the workers thereof, on pain of forfeiting the same, half to the queen, or party deceived, &c. as before mentioned."

† *Stat.* 125. And it is further enacted, " That all barrels, kilderkins, and firkins filled with honey by the maker and filler, shall be marked with two letters standing for his name and surname, each letter of an inch and a half in length at least, burnt upon the head of the cask with a hot iron, upon pain of 6 s. 8 d. for every package sold, or offered to be sold, and not so marked."

† *Stat.* 126. And it is further enacted, " That whoever shall fill and sell, or cause to be filled and sold, or offered to be sold, any barrel, kilderkin, or firkin, with honey, for or in the name of a barrel, kilderkin, or firkin, containing less than 32 wine gallons the barrel, 16 wine gallons the kilderkin, and 8 wine gallons the firkin, shall forfeit for every half gallon so lacking, five shillings. And whoever shall corrupt the honey so sold with any deceitful mixture shall forfeit the barrel or vessel, and the honey therein, to be divided between the queen and the prosecutor."

† *Stat.* 127. But it is provided, " That this act shall not extend to persons selling the wax of their own bees, in small pieces in open market, nor to servants employed by their masters in mingling, &c. so as they will confess the same."

† *Stat.* 128. " And whoever shall counterfeit any of the stamps or marks above mentioned, or shall use the marks of another, shall forfeit 5 l. to be recovered and divided as aforesaid, and for non-sufficiency of payment to be set on the pillory in the next market town, and suffer three months imprisonment."

† *Stat.* 129. Eleventhly, As to COALS, it is enacted, by 1 Ann, stat. 2. c. 17. " That the coal bushel shall be made
" round

“ round with a plain and even bottom, nineteen and one half
 “ inches in diameter, and to contain one *Wierbaster* bushel,
 “ and one quart of water. A brass standard of which bu-
 “ shel shall be kept in the Exchequer.”

† *Stat.* 130. And it is enacted by 16 and 17 Car. 2. c. 2.
 “ That all sea coal brought into the Thames shall be sold by
 “ the chaldron, containing 36 bushels heaped up, and ac-
 “ cording to the bushel sealed for that purpose at Guildhall,
 “ and so for a greater and lesser quantity; and that all other
 “ sorts of coals, sold by weight and not by measure, shall be
 “ sold after the proportion of 112 lb. *averdupois* to the hun-
 “ dred weight, upon pain of forfeiture, and of double the va-
 “ lue, on conviction by one justice where the offence shall
 “ be committed, half to the prosecutor, and half to the poor,
 “ or to the surveyor of the highways as the magistrate shall
 “ direct.”

† *Stat.* 131. And it is further enacted by 17 Geo. 2. c. 35.
 “ That any three justices shall be empowered to set the prices
 “ of sea coals, as they, from time to time, shall judge rea-
 “ sonable, allowing a competent profit to the retailer, be-
 “ yond the price paid by him to the importer, &c.; and if
 “ any engrosser or retailer of such coals shall refuse to sell as
 “ aforesaid, the justices taking a constable, may enter the
 “ wharf, &c. and sell the same, returning the produce to
 “ such engrosser or retailer, deducting the charges; but no
 “ interested person shall be engaged in setting such price as
 “ aforesaid.” (6)

(6) For the regulation respecting coals within the bills of mortality, vide 3 Geo. 2. c. 26. 11
 Geo. 2. c. 15. 19 Geo. 2. c. 35. 20 Geo. 2. c. 49. 23 Geo. 2. c. 26. 32 Geo. 2. c. 13
 Geo. 3. c. 25. 21 Geo. 3. c. 24.

CHAPTER THE EIGHTY-FIRST.

OF BARRATRY.

Minshew.
 Duffin.
 Spelman.

IN treating of Barratry, I shall consider: First, Who shall
 be said to be a Barrator. Secondly, In what manner such
 an offender is to be proceeded against. Thirdly, To what
 punishment he is liable.

Dalt. p. 38.
 Co. Lit. 368.
 2 Coke 36.
 2 Croke 327.

Stat. 1. As to the first point it seems, That a Barrator is a
 common mover, exciter, or maintainer of suits or quarrels,
 either in courts, or in the country.

Stat.

Sec. 2. And it is said not to be material; whether the courts wherein such suits are commenced, be of record or not; or whether such quarrels in the country relate to a disputed title of possessions or not; but that all kinds of disturbances of the peace, and the spreading of false rumours and calumnies, whereby discord and disquiet may grow among neighbours, are as proper instances of barratry, as the taking or keeping the possession of lands in controversy.

Co. Lit. 168.
3 Coke 36.

Sec. 3. But it hath been holden, That a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right. However if such actions be merely groundless and vexatious without any manner of colour, and brought only with a design to oppress the defendants, I do not see why a man may not as properly be called a barrator for bringing such actions himself, as for stirring up others to bring them.

1 R. Abr. 355.
3 Modern 98.
3 Coke 36.

Sec. 4. But it seems that an attorney is in no danger of being judged guilty of an act of barratry in respect of his maintaining another in a groundless action, to the committing whereof he was no way privy.

3 Mod. 97, 98.

Sec. 5. Also it seems clear, That no one can be a Barrator in respect of one act only; for every indictment for such crime must charge the defendant with being *communis barrator*.

3 Coke 36.

Sec. 6. It seems to have been holden, That a feme covert cannot be indicted as a common barrator; but this opinion seems justly questionable; for since a feme covert is as capable of exciting quarrels, in the frequent repetition whereof the notion of barratry seems to consist, as if she were sole, why should she not as properly be indictable for it?

2 Rolle 39.

See chap. 1.
sect. 13.

Sec. 7. As to the second point, viz. In what manner offenders of this kind are to be proceeded against, it is enacted by 34 Edw. 3. c. 1. "That in every county shall be assigned
" for the keeping of the peace one lord, and with him three
" or four of the most worthy of the county, &c. and that
" they shall have power to restrain offenders, rioters, and all
" other barrators; and to pursue, arrest, take, and chastise
" them, according to their trespasss or offence; and so cause
" them to be imprisoned and duly punished according to the
" law and customs of the realm, and according to that which
" to them shall seem best to do by their discretions and good
" advisement, &c."

Sec. 8. It seemeth from these words, That justices of peace (as such) have cognizance of barratry without any other commission, *sed quare*; for the contrary opinion seems to have been holden in Rolle's Reports.

Con. B. 2. c. 8.
f. 38, 39.
Yelvetton 46.
2 Rolle 131.

Sec.

1 Modern 288.
1 Sid. 282.
C. Jac. 526.

Sett. 9. However it seems clear, that no general indictment of this kind, charging the defendant with being a common oppressor, and disturber of the peace, and stirrer up of strife among neighbours, is good, without adding the word *communis barrator*, which is a term of art appropriated by the law to this purpose.

(a) 2 R. Ab.
79. 82.
C. Jac. 527.
C. Car. 340.
2 Keb 409, 410.
C. Elis. 148.

Sett. 10. (a) Also it seemeth to be certain, That an indictment of Barratry concluding *contra formam statuti*, is good, though no statute be made directly against it, but only for the punishment of it, supposing it an offence at common law.

(b) 2 Keb. 410.
C. Elis. 195.
Con. Lat. 194.
a Hale 180.
Palmer 450.
1 Rolle 295.

Sett. 11. (b) Also it hath been holden, That an indictment of this kind may be good, without alledging the offence at any certain place, because from the nature of the thing, consisting in the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, That a trial ought to be by a jury from the body of the county.

(c) C. Jac. 527.

Sett. 12. (c) But it hath been resolved, That such an indictment is not good, without concluding *contra pacem*, &c. for this is an essential part of it.

(d) 5 Mod. 18.
1 Ld. Ray. 490.
12 Mod. 516.

Sett. 13. (d) Also it seemeth to be settled practice, not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters, which he intends to prove against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances.

Hutton 104.

Vide 1 Dan.
Ab. 113, 113.

Sett. 14. As to the third point, *viz.* In what manner offenders of this kind are to be punished. It is said, That if they be common persons, they are to be fined and imprisoned, and bound to their good behaviour; and if they be of any profession relating to the law, that they ought also to be farther punished, by being disabled to practise for the future.

CHAPTER THE EIGHTY-SECOND,

OF USURY.

OFFENCES, under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace, which may be committed by *privas person*

persons without any relation to an office, and which are neither infamous nor grossly scandalous, and more immediately affect the interests of particular persons, seem to be reducible to the following heads: Usury. Maintenance. And The offence of buying or selling pretended titles.

In treating of USURY, I shall consider: First, What it is. Secondly, How it is restrained by common law. Thirdly, How by statute.

SECT. 1. And first it seems, that usury, in a strict sense, is a contract upon the loan of money to give the lender a certain profit for the use of it, upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be repaid on the day appointed, or not.

Wood's Inst.
B. 3. p. 423.
3 Inst. 151.
B. Usury, 12.
2 Strange, 928.
1243.
4 Comm. 196.
2 Comm. 459.

SECT. 2. And in a larger sense it seemeth, That all undue advantages taken by a lender against a borrower come under the notion of usury, whether there were any contract in relation thereto, or not; as where one in possession of land, made over to him for the security of a certain debt, retains his possession after he hath received all that is due from the profits of the land.

Gibb. 1070.
Cowper 793.

SECT. 3. But it hath been resolved, That an agreement to pay double the sum borrowed, or other penalty on the non-payment of the principal debt at a certain day, is not usurious, because it is in the power of the borrower, wholly to discharge himself, by repaying the principal according to the bargain.

2 R. Abr. 807,
802.
26 Edw. 3. 71.
2 Inst. 89.
5 Rep. 69.
Cowper 113.

SECT. 4. As to the second point, viz. How usury is restrained by the (a) common law. It is said, That anciently it was holden to be absolutely unlawful for a christian to take any kind of usury, and that whosoever was guilty of it, was liable to be punished by the censures of the church in his lifetime; and that if after death any one was found to have been an usurer while living, all his chattels were forfeited to the king, and his lands escheated to the lord of the fee.

(a) 3 Inst. 151.
2 R. Abr. 802,
801.
2 Inst. 506, 507.
Palm. 293, 294.
Tempus Hard-
wick 420.

SECT. 5. Also it seemeth to have been the opinion of the makers of some late acts of parliament, as 5 Edw. 6. c. 20. 13 Eliz. c. 8. s. 5. and 21 Jac. 1. c. 17. s. 5. That all kinds of usury are contrary to good conscience.

2 Ventris 42.
2 Vern. 145.
Eq. Ca. Ab. 233.

SECT. 6. (b) And agreeably hereto it seemeth formerly to have been the general opinion, That no action could be maintained on any promise to pay any kind of use for the

(b) 2 R. Abr.
801.
26 Ed. 1. 71.
1 R. Abr. 13.

2 Roll. 239.
240, 469.
Palm. 293.

forbearance of money, because that all such contracts were thought to be unlawful, and consequently void.

(a) 1 R. Abr.
25.
2 R. Abr. 782,
802.
Winch. 114,
120.
C. Jac. 378,
379.
1 Ven. 198, 199.
3 Keble 15.
C. Gar. 273.

Exod. c. 22.
v. 25.
Levit. c. 25.
v. 36. 37.
Deuter. c. 23.
v. 19, 20.

Sec. 7. But it seems to be generally agreed at this day, (a) That the taking of reasonable interest for the use of money is in itself lawful, and consequently that a covenant or promise to pay it, in consideration of the forbearance of a debt, will maintain an action: For why should not one who has an estate in money be as well allowed to make a fair profit of it, as another who has an estate in land? And what reason can there be, that the lender of money should not as well make an advantage of it as the borrower? Neither do the passages in the *Mosaic* law, which are generally urged against the lawfulness of all usury, if fully considered, so much prove the unlawfulness, as the lawfulness of it; for if all usury were against the moral law, why should it not be as much so in respect of foreigners, of whom the Jews were expressly allowed to take it, as in respect of those of the same nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, That the prohibition of it to that people was merely political, and consequently doth not extend to any other nation.

37 H. 8. c. 9.
13 Lill. c. 1.

B. R. H. 233.
c. Strange 1043.

(b) Though
the reservation
be of so much
if requested; and
the request is
never made.

Sec. 8. As to the third point, viz. How usury is restrained by statute. It is enacted by 12 *Annæ*, c. 16. "That
" no person whatsoever, shall upon any contract take, di-
" rectly or indirectly, for loan of any money, wares, mer-
" chandize, or other commodities whatsoever, above the va-
" lue of five pounds, for the forbearance of one hundred
" pounds for a year, and so after that rate for a greater or
" lesser sum, or for a longer or shorter time; and that all
" bonds, contracts, and assurances whatsoever, for payment
" of any principal, or money to be lent, or covenanted to be
" performed upon or for any usury, whereupon or whereby
" there shall be reserved (b) or taken above the rate of five
" pounds in the hundred, as aforesaid, shall be utterly
" void,"

3 Atk. 154.
3 Keble 259,
260.
1 Vent. 253.
3 Will. 250.

AND it is further enacted, "That all and every person or
" persons whatsoever, which shall upon any contract take,
" accept, and receive, by way or means of any corrupt bar-
" gain, loan, exchange, chevizance, shift, or interest of any
" wares, merchandize, or other thing or things whatsoever,
" or by any deceitful way or means, or by any covin, engine,
" or deceitful conveyance, for the forbearing or giving day of
" payment for one whole year, of and for their money or
" other thing, above the sum of five pounds for the forbear-
" ing of one hundred pounds for a year, and so after that rate

" set

“ for a greater or lesser sum, or for a (a) longer or shorter
 “ term, shall forfeit and lose for every such offence the treble
 “ value of the money, wares, merchandize, and other things
 “ so lent, bargained, exchanged, or shifted.”

(a) Vide C. Jac.
 25.
 Moor 644.
 Noy 41.
 C. Car. 283.
 4 Leonard 43.
 C. Eliz. 20.
 Douglas 224.
 3 Leo. 205.
 2 Leo. 38.

And note, That the treble value is not forfeited, unless something be taken above the legal rate. But the very contract alone avoids the security. (1)

(1) *G.* borrowed 100*l.* of *B.* on his bond conditioned to repay the same at six months, with 5 per cent. per ann. and gave two guineas to *B.* at the time the money was advanced, as a premium for the loan. The principal, and 2*l.* 10*s.* interest, were repaid at the end of six months. Under the first branch of the statute, the bond is void; but under the second the usury was not complete till the half year's interest was received, for the penalty is incurred only by taking, accepting, and receiving more than legal interest. Douglas 225. 3 Wilton 262. 2 Black. 796. For to constitute the offence three things must concur: 1. A contract between the parties. 2. Monies, or other things lent. 3. Above 5 per cent. per ann. received by the lender for forbearance. 3 Wilton 362. 4 Burn 2252.

Stat. 9. And it is farther enacted by the said statute,
 “ That every scrivener, broker, solicitor, and driver of bar-
 “ gains, for contracts, who shall take or receive, directly or
 “ indirectly, any sum or sums of money, or other reward or
 “ thing, for brokage, soliciting, driving or procuring the
 “ loan, or forbearing of any sum or sums of money, over and
 “ above the rate or value of five shillings for the loan, or
 “ forbearing of one hundred pounds, for a year, and so rate-
 “ ably; or above twelve pence, over and above the stamp
 “ duties, for making or renewing of the bond or bill for loan,
 “ or forbearing thereof, or for any counterbond or bill con-
 “ cerning the same, shall forfeit for every such offence twenty
 “ pounds, with costs of suit, and suffer imprisonment for half
 “ a year; the one moiety of all which forfeitures shall be to
 “ the queen, the other to him that will sue for the same, in
 “ the same county where the several offences are committed,
 “ &c.”

And the con-
 tract is void.
 Carth 252.

The expositions which were made of the former statutes of usury being equally applicable to this, which is penned almost in the very same words, I shall take notice of the principal of them.

1 Atk. 340.
 1 Ves. 142.

Stat. 10. First, That a contract made before the statute is no way within the meaning of it, and therefore that it is still lawful to receive *fix per cent.* in respect of any such contract.

14 Geo. 3. c. 79.
 Dalif. 72.
 Con. Raym.
 197.

Stat. 11. Secondly, That a bond made to secure a just debt payable with lawful interest, shall not be avoided by reason of a corrupt agreement between the obligors, to which the obligee was no way privy: As where *A.* being indebted to *B.* in 100*l.* agrees to give him 30*l.* for the forbearance of

Salkeld 344.
 Com. 4, 6.
 5 Com. Dig. 610.
 2 And. 121.
 Moor 752.
 C. Jac. 32, 33.
 Yelverton 47.
 2 Burr. 1077.

7 Modern 118. that 100*l.* for a year, and gives him a bond of 60*l.* for pay-
 2 Strange 1249. ment of the 30*l.* and for the payment of the 100*l.* enters into
 L. Nisi P. 27. a bond of 200*l.* together with *B.* for the payment of a true
 Carthew 356. debt of 100*l.* due from *B.* to *C.* (2)

(2) But a bill of exchange for 200*l.* for which goods instead of money had been colourably ad-
 vanced, is void, although in the hands of an innocent indorsee, for a valuable consideration, and
 without notice of the usurious contract of the original parties. Douglas 708 to 716.

1 Modern 69. *Scd.* 12. Thirdly, That the receipt of higher interest, than
 3 Keble 142. is allowed by the statute, by virtue of an agreement subsequent
 2 Modern 357. to the first contract, does not avoid an assurance fairly made,
 1 Saund. 294. and agreeable to the statute, but only subjects the party to the
 Raym. 106. forfeiture of treble value; for the words are, "That all assu-
 2 Keble 325, 690. rances for the payment of any principal, &c. whereupon
 3 Salkeld 390. "or whereby there shall be referred or taken above the rate
 1 Bull. 17. "of 5*l.* in the hundred, &c. shall be utterly void."

2 Roll. 398. Expressly confirmed by Lord Mansfield, in *Floyer v. Edwards*, Cowper 114. Yet
 Cowper 114. *Lora* 112 said, That if a mortgage be drawn for only 5 per cent. and the mortgage after-
 wards take above the legal interest, the deed would be void upon the word *take*. 3 Atkins 154.

Noy 37. *Scd.* 13. Fourthly, That in an assurance for the payment
 1 Leon 96. of fifty shillings for the use of 100*l.* for six months, the com-
 putation shall be by calendar and not by lunar months, be-
 cause by the latter the interest would exceed the rate allowed
 by the statute.

1 Bull. 17, 20. *Scd.* 14. Fifthly, That the receipt of interest before the
 Yel. 30, 31. time when it is in strictness due, being voluntarily paid by
 Noy 471. the debtor for the greater convenience of the creditor, or for
 2 Keble 650. any other such like consideration, without any manner of cor-
 Con. 1 Leon. 96. rupt practice, or any previous agreement of this kind at the
 making of the first contract, does not make the party liable
 to the forfeiture of the treble value.

4 Leon. 208. *Scd.* 15. Sixthly, That the grant of an annuity for lives
 3 Will. 390, 396. not only exceeding the rate allowed for interest, but also ex-
 1 Bull. 36. ceeding the known proportion for contracts of this kind, in
 1 And. 121. consideration of a certain sum of money, is not within the
 C. Jac. 253, meaning of the statute, unless there were some underhand
 6 S. 67, 618. bargain for the security of the repayment of the principal or
 Noy 151. consideration-money.

2 Lev. 7, 8. 782. H. 1. *Scd.* 16. Seventhly, That no contract is usurious, by
 V. 1. 2 R. Abr. which the lender runs the hazard of losing all his money, both
 1 Vaz. 164. 17 Geo. 3. c. 26. 1 Atk. 359, 351. C. Eliz. 27. 642, 643. 2 Black. 859. Comp.
 728. Confirmed by Ld. Thurlow, Hil. 21 Geo. 3. Brown's Rep. Chan. 93. Ld. Graham v.
 Child.

C. Jac. 208, 509. *Scd.* 16. Seventhly, That no contract is usurious, by
 Hard. Jay v. which the lender runs the hazard of losing all his money, both
 Kent. principal and interest: As where on the loan of a certain sum
 1 Keble 539, for a year, for the victualling of a ship, it is agreed, That if
 711. the

the ship return, the lender shall have so many thousand fishes at such a rate, which exceeds the interest allowed by the statute, and if the ship never return, or if it perish by unavoidable casualties of sea, fire, or enemies, that then he shall have nothing: or where on the loan of 30*l.* a bond is given for the payment of 100*l.* on the marriage of a daughter of one of the parties; provided, That if either of them should die before, that then nothing should be paid: but it is clear, That if the interest only be hazarded on such a contract, and the whole principal secured, the whole is usurious. Also it hath been resolved, That an agreement to pay more than the lawful interest for the loan of a certain sum at such a day, if *A. B.* shall be then alive, and if he shall be dead, then to pay such a sum which is less than the principal, is void by the statute; for if such a contingency would exempt the case out of the statute, by the same reason twenty lives might be added, and the statute wholly evaded. (3)

1 Atk. 340.
2 Roll. 48.
3 Roll. 48.
2 Black. 353.
1 Lev. 54.
1 Sid. 27.
Showers R.p. 8.
3 Keble 304.
Said to be
good law.
1 Atk. 341.
Vide C. Elis.
741.
2 Roll. 48.
C. Jac. 503.
Cowp 793.
5 Coke 70.
1 Atk. 340.
Moor 397.
C. Elis. 642,
643, 741.
Lutw. 463.
Carth. 68.
Comb. 25. 1 Show. 8.

(3) Therefore a loan of 5000*l.* to be paid 1000*l.* on the death of *A.* in the life-time of *B.* is not usurious. 1 Atk. 339, 350.—If the contingency goes to the interest only, though real and not colourable, and notwithstanding it be a hazard, yet it is usurious. If the contingency relates to both principal and interest, and a higher rate of interest is taken, the courts have there enquired whether it were colourable or not, for if I lend 100*l.* to have 120*l.* at the year's end upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury, for the party is sure to have the principal again, come what come will. But if the principal and interest are little in hazard, it is not usury. *A.* gave credit to *B.* for jewels to a certain amount. *B.* not being able to raise money upon them, desired that *A.* would exchange them for old plate. *A.* said old plate was as good as money, and accordingly gave him the value of as much old plate as was less by 100*l.* than what the jewels had been sold for; *for the whole amount of which B. was to stand indebted.* The Court thought this did not come under the description of usury. *Johnson qui tam v. Pickett, &c. B. R. East. 1785.* But see 1 Atk. 351. But if these loans are merely colourable, they may be usury. 1 Atk. 341. And it is the intent of the agreement, and not the expression, that determines it to be a loan, or a risque. 1 Atk. 346. And where more than 5 *per cent.* is taken, if the substance of the contract be a borrowing and a lending, a slight colourable contingency only will not take it out of the statute. Cowper 770.

Sec. 17. Eighthly, That an assurance made in pursuance of a fair agreement for such interest as is allowed by the statute, shall not be avoided by the fault of the scrivener, who draws it up in such a manner as to bring it within the express letter of the statute: As where the parties agree, That 5*l.* shall be paid for the loan of 100*l.* for a year, and the scrivener, in drawing the bond for it, doth, without the knowledge of the parties, who are illiterate persons, make the 5*l.* payable at the end of half a year: or where on the fair loan of 100*l.* agreed to be paid with common interest, a mortgage is made for the 100*l.* with a proviso, that it shall be void on payment of 105*l.* at the end of one year, without any covenant for the mortgagor to take the profits till default be made of payment, so that in strictness the mortgagee is intitled both to the interest and profits.

C. Jac. 677, 678.
2 Roll. 414, 415.
Het 11.
1 Jon. 396.
C. Car. 501.
2 Ven. 83.
3 Will. 396.
Hard. 418.
1 Freem. 264.
1 Mod. 307.
2 R. Abr. 793.
798, 5.

5 Co. 70.
Cowper 114.
115.

SecT. 18. Ninth, That the loan of money for lawful interest allowed by the statute, shall not be construed to be within the purview of it, in respect of any expectations which the lender may have of a voluntary gratuity to be given him by the borrower, if there be no kind of agreement relating to it.

5 Co. 69.
C. Jac. 509.
Cowper 113.
2 Bur. 715.
C. Eliz. 643.
1 Lut. 462.
2 Bur. 891.
1 Atk. 342.
1 Atk. 351.
5 Co. 69.
See Mo. 397.
2 And. 16.
1 Atk. 350.
Cowper 794.
2 Strange 1243.

SecT. 19. Tenth, That the reservation of a greater sum than is allowed by the statute for interest, upon the non-payment of the principal at the end of the year is not usurious within the statute, because it is in the power of the borrower, to avoid the payment of the money so reserved, by paying the principal at the day appointed; yet it seemeth clear, that if it were originally agreed, that the principal money should not be paid at the time appointed, and that such clause was inserted only with an intent to evade the statute, the whole contract is void; for the construction of cases of this nature must be governed by the circumstances of the whole matter, from which the intention of the parties will appear in the making of the bargain, which, if it was in truth usurious, is void, however it may be disguised by a specious assurance. (4)

(4) In all questions in whatever respect repugnant to the statute, the nature and substance of the transaction, and the view of the parties must be ascertained to satisfy the court that there is a *loan and borrowing*, and where the real truth is a *loan of money*, the wit of man cannot find a *shift* to take it out of the statute, and though the statute mentions only "for loan of monies, wares, merchandizes and other commodities," yet any other contrivance, if the substance of it be a *loan* will come under the word "indirectly," Cowper 115. 796. Douglas 712. If a man borrows under the colour of buying, it is usurious. Ibid. 116. But if goods are sold to be paid for at the expiration of three months, or to allow the seller such an additional profit as exceeds the legal rate of interest, yet it is not usury. Floyer v. Edwards. Plumb v. Carter. Cowp. 112. 116.

(a) 3 Co. 80.
C. Co. 35.
1 Jon. 203.
1 Roll. 41. 42.
2 Ven. 83. 108.
2 Leon. 166.
Con. C. Eliz.
25, 488.
1 Sid. 182.
(b) Salk. 22.
Skin. 411. 412.
Lut. 273.
Cro. Eliz. 588.
Or the court may direct an issue to try the usurious contract. Cowper 723. Strange 1243.
B. R. H. 233.

SecT. 20. Eleventh, That a fine (a) levied, or judgment suffered, in pursuance of an usurious contract, may be avoided by an averment of the corrupt agreement, as well as any common specialty, or parol contract. And in an *assumpsit* (b) if it appear, either upon the evidence, or from the plaintiff's own express shewing in his declaration, that the contract was usurious, he cannot recover. But a specialty cannot be avoided by usury appearing on evidence or on the face of the condition, but it must be pleaded.

(c) C. Jac. 252.
508.
2 Roll. 48.
2 Lev. 7, 8.
(d) Lutw. 273.
466.

SecT. 21. Twelfth, That it is not (c) material whether the payment both of the principal and also of the usurious interest be secured by the same (d) or by different conveyances, but that all writings whatsoever for the strengthening such a contract, are void.

SecT. 22. Thirteenth, That a contract reserving to the lender a greater advantage than is allowed by the statute, is equally

equally within the meaning of it, (e) whether the whole be relieved by way of interest, or in part only under that name, and in part by way of rent for a house, let at a rate plainly exceeding the known value.

(e) C. Jac. 440.
Cowp. 795.
Doug. 223.
Noy 151.
3 Willf. 250.
2 Blac. 792.
Eliz. 20.

Sec. 23. Fourteenth, That a second bond made after the forfeiture of a former, and conditioned for the receipt of interest according to the penalty of the forfeited bond, is as much within the statute as if it had been made before the forfeiture; for if such a practice should be allowed, nothing could be more easy than to elude the statute; and though the whole penalty be due in strictness to the obligee, yet the true principal debt is in conscience no greater after the forfeiture of the bond than it was before.

3 Keble 142.
Con Noy 2.

Sec. 24. Fifteenth, That in pleading an usurious contract by the way of bar to an action, you must set forth the whole matter especially, because it lay within your own privacy; but that in an information on the statute for making such a contract, it is sufficient to set forth the corrupt bargain generally, because matters of this kind are supposed to be privily transacted, and such information may be brought by a stranger.

1 And. 49.
1 Sid. 285.
3 Modern 35.
1 Keble 629.
Noy 143.
Cro. Jac. 440.
Vide C. Car.
501.
Precedents.
2 Ven. 81.
Lutw. 468.
Co. En. 168.
1 Leon. 96, 97.

Clift 185. Bro. V. M. 255. Jones 413. Cowp. 72.

Sec. 25. Sixteenth, (f) That in every such information (f) it is necessary expressly to set forth the place, where the corrupt bargain was made. (5)

(5) The time also is essential, and must be exactly laid, but if it is the true time it is sufficient if laid under a videlicet. Cowper 114. Therefore on a draft dated the 14th, but not signed till the 16th, and the day was laid on the 14th, it was held bad. So also the time must be precisely proved. Therefore where the time of payment was laid to be on a particular day, and it appeared that the time of payment was two years it was held a fatal variance, for the contract must be proved as it is laid. Cowper 671.

Sec. 26. Seventeenth, That if an usurious contract in the county of D. be pleaded in bar to an action on a bond said to be made in the county of E. the trial shall be in the county of D. because the ground of the matter is the usurious contract, and the bond is confessed by the plea.

1 Leon 148, 149.

Sec. 27. Eighteenth, That he who hath agreed to pay money upon an usurious contract, shall not be admitted to give evidence upon an information against the usurer, unless he have paid off the whole debt; for by such means a man might avoid his own act and deed.

Hardress 331.
Co. Lit. 6. b.
2 Roll. 685.
2 Raym. 191.
b. 2. c. 46. f.
24.
1 Vent. 49.
1 Salk. 285.

2 Str. 1043. Strange 613. 498. And it has been decided that the borrower who repays the money is, himself, a good witness to prove such repayment, and also the usurious contract. *Abraham qui tam v. Bunn.* 4 Burrow 2256. Vide also *De Grey's* opinion, 3 Willson 262. And the borrower may be a witness, though the money is not repaid if the usury neither affects the debt or avoids the contract, and where the matter is doubtful the objection shall only go to the credit and not to the competency. *Ibid.* See the case of *Fitzroy v. Guillim*, Durnford and East 153.

1 Leon. 95. 96. *Sett.* 28. Nineteenth, 'That an information for an usurious contract on a loan of money, cannot be supported by evidence of such a contract on a bargain concerning wares sold.
 2 Strange 1243. 1043.
 1 Wilson 286. Vide 1 Modern
 174. whether an indictment will lie on 12 Ann. also Strange 816. Ld. Ray. 1144. 2 Salk. 682
 And whether the prosecutor may compound. Barnes 118.

The plaintiff may reply *quod non corrupte agreeatum fuit. Quod licite bargainizavit* with a travers of the corrupt agreement. Cl. Ass. 324. So on a note, the plaintiff may reply, that the note was given for a just debt, *absque hoc* that is agreed *modo & forma*, as the defendant pleads. Hard. Cases 287.

On a bill to set aside an usurious contract the defendant may demur to the discovery of ~~usury~~ interest he agreed to take, because he cannot set that forth without disclosing the very interest he has taken. 2 Atk. 393.

The bank may borrow money at more than 5 per cent.

† *Sett.* 29. It is enacted by 3 Geo. 1. c. 8. s. 39. "That the governor and company of the Bank of England shall have authority to borrow or take up money upon any contracts, bills, bonds, or obligations, under their common seal, or upon credit of their capital stock or otherwise for any time or to be paid upon demand and at such rate of interest as they shall think fit although the same shall happen to exceed the rate of interest allowed by law, and to give such security to the lenders as they shall approve."

† *Sett.* 30. And by 14 Geo. 3. c. 79. which was made to explain the 12 Ann before recited, it is further enacted, "That all mortgages and securities made and executed in Great Britain of or concerning any lands, tenements, hereditaments, slaves, cattle, or other things lying or being in any of the colonies, plantations or dominions of the *West Indies*, or any estate or interest therein to any of the king's subjects, for securing the re-payment of the sum of money thereon respectively really and *bona fide* advanced and lent with interest for the same; and all securities for the same; and all transfers and assignments of the same executed in Great Britain shall be good and valid; and that none shall be liable to the penalties of 12 Ann by receiving or taking interest for the money really advanced on such mortgage, security, bond, covenant, transfer and assignment at the rate of interest allowed and established by the law of the place where the mortgaged premises shall lie or are, and by par. 2. if the premises shall lie in Ireland, interest may be taken on securities executed as aforesaid not exceeding six per cent. per annum."

CHAPTER THE EIGHTY-THIRD.

OF MAINTENANCE.

MAINTENANCE is commonly taken in an ill sense, and in general seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right, and is said to be two-fold :

Sec. 2. First, *Ruralis*, or in the country ; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty, or where one stirs up quarrels, and suits in the country, in relation to matters wherein he is no way concerned : And this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not, but is said not to be actionable.

Sec. 3. Secondly, *Curialis*, or in a court of justice, where one officiously intermeddles in a suit depending in any such court which no way belongs to him, by assisting either party with money or otherwise, in the prosecution or defence of any such suit.

Of this second kind of maintenance there seem to be three species : First, where one maintains another without any contract to have part of the thing in suit, which generally goes under the common name of Maintenance. Secondly, where one maintains one side, to have part of the thing in suit, which is called Champerty. Thirdly, where one laboureth a jury, which is called Embracery.

For the better understanding of the first of the abovementioned species, I shall examine : First, what shall be said to amount to an act of maintenance. Secondly, in what respects some such acts may be justified. Thirdly, how far offences of this kind are restrained by the common law. Fourthly, how far by statute.

Sec. 4. As to the first point, it seemeth clear, That whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out in the whole or part of the expence of the suit, may properly be said to be guilty of an act of maintenance,

(a) 23 H. 6. 7. nance, as it seems to be taken for granted in the (a) book
12. cited in the margin.

34 H. 6. 25, 26.

9 E. 4. 32.

21 H. 7. 40. 6 E. 4. 5. 19 E. 4. 3. 31 H. 6. 9. B. Maint. 7. 14. 17. 20. 24. 43. 44.
52. 2 R. Abr. 118. 6 Mo. D. 2. Rol. 77.

Sec. 5. Also it is said, That not only he who lays out his money to assist another in his cause, but also that he who by his friendship or interest saves him that expence which he might otherwise be put to, or but endeavours so to do, is also guilty of maintenance; as where (b) one persuades, or but endeavours to persuade a man to be of counsel for another *gratis*.

(b) 28 H. 6. 7.

12.

34 H. 6. 25.

9 E. 3. 52.

Main. 6, 7, 20.

Sec. 6. Also it is said, That all such persons may properly be called maintainers, who give, or but endeavour to give, any other kind of assistance to either of the parties, in the management of the suit depending between them: as (c) by opening the evidence to the jury; or by (d) giving evidence officiously without being called upon to do it; or by speaking in the cause as (e) one of counsel with the party; or by (f) retaining an attorney for him; or (g) perhaps for barely going along with him to enquire for a person learned in the law.

(c) 22 H. 6. 5.
Main. 14.

C. Eliz. 735.

(d) 28 H. 6. 6.

11 H. 6. 41.

Main. 5, 51.

Main. 10.

2 R. Abr. 118.

(e) Het. 78, 79.

(f) 1 R. Abr. 593. (g) 19 E. 4. 3. 12 E. 4. 14. Het. 79.

Sec. 7. Also it hath been said, That those shall come under the like notion, who give any public countenance to another in relation to any such suit; as where one of great power and interest says (b) publicly, that he will spend twenty pounds on one side, or that he will give twenty pounds to labour the jury, whether in truth he spend one penny or not; or where such a person (i) comes to the bar with one of the parties, and stands by him while his cause is tried, whether he say any thing or not; for such kinds of practices do not only tend to discourage the other party from going on in his cause, but also to intimidate juries from doing their duty. But it seems, that a bare (k) promise to maintain another, is not in itself maintenance, unless it be either in respect of the public manner in which, or the power of the person by whom, it is made.

(b) 22 H. 6. 5.
Main. 14.
Main. 8.

(i) 22 H. 6. 6.
11 H. 6. 39.
19 E. 4. 3.
Main. 51.

(k) 9 H. 7. 18.
B. Champ. 9.

Sec. 8. Also it is said to be as much maintenance for a (l) juror, as for any other person, to solicit a judge to give judgment according to the verdict, because after a juror has given his verdict, he has nothing more to do: But it is said to be

no maintenance for a juror to exhort his companions to join with him in giving such a verdict as seems to him to be right.

Sec. 9. However it seems clear, (*m*) That a man is in no danger of being judged guilty of an act of maintenance, for giving another friendly advice, what action is proper for him to bring for the recovery of a certain debt, or what method it is safest to take to free him from such an arrest, or what counsellor or attorney is likely to do his business most effectually; for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blame-worthy, to come under the notion of maintenance, which always seems to imply a contentious and over-busy intermeddling in other mens matters, in which respect it is so highly criminal. Yet it is said, that a man of great power not learned in the law, may be guilty of maintenance, by telling another who asks his advice, that he has a good title.

(*m*) 12 E. 4. 14.
19 E. 4. 3.
22 H. 6. 5.
B. Main. 17.
3 R. Abr. 118.
2 Inst. 564.
Moor 6.
F. Main. 22.
2 Roll. 131.
Co. Litt. 364.
2 Leon. 43.

Sec. 10. Also it hath been said, that no one can be guilty of maintenance, in respect of any money given by him to another before any suit is actually commenced; yet if it plainly appear, that it was given merely with a design to assist him in the prosecution or defence of an intended suit, which afterwards is actually brought; surely it cannot but be as great a misdemeanor in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the suit, though perhaps it may not in strictness come under the notion of maintenance.

3 H. 6. 54.
F. Main. 13.
B. Main. 2.

If a mortgagee, not a party in the suit, advances money to support the title it is not maintenance.
3 P. W. 375.

Sec. 11. However it is certain, That one may as properly be said to be guilty of maintenance, within the meaning of the words *ad huc manu tenet*, in an action of maintenance, for supporting another after judgment, as for doing it hanging the plea; because the party grieved may be discouraged thereby from bringing a writ of error or attaint.

47 Ed. 3. 10.
B. Champ. 2.

As to the second point, *viz.* In what respects some acts of this kind may be justified, I shall consider the following particulars: First, how far they are justifiable in respect of an interest in the thing in variance. Secondly, how far in respect of kindred or affinity. Thirdly, how far in respect of other relations. Fourthly, how far in respect of charity. Fifthly, how far in respect of the profession of the law.

Sec. 12. As to the first of these particulars, viz. How far some acts of this kind are justifiable in respect of an interest in the thing in variance, it seemeth to be clearly agreed, that if (a) a tenant in tail, or for life, be impleaded, he in remainder or reversion may lawfully maintain the defence of the suit with his own money: And upon the like ground it seems to be clear, that if in an action of trespass, &c. brought by or against a (b) lessee for years, the inheritance come into question, the lessor may lawfully maintain his lessee, and give (c) evidence to prove the inheritance in himself; for though the judgment which may be given against the lessee cannot directly bind his inheritance, yet the verdict may be a prejudice to his title, being given on a supposal of his not having a good one: also it hath been admitted as clear law, that if one seised in fee of certain land, bring an action of trespass *quare clausum fregit*, and then alien the land, and afterwards in the trial of the cause it be questioned whether the inheritance at the time of the supposed trespass belonged to the plaintiff or defendant, the alienee may lawfully produce evidence to prove that the inheritance was in the plaintiff, because the plaintiff's title is now become his own.

Sec. 13. Also it hath been said, that not only those who have a certain interest, but also that those who have a bare contingency of such an interest in the lands in question, which possibly may never come *in esse*, may in like manner lawfully maintain another in an action concerning such lands; from whence it follows, That if I grant to B. that if my lessee for life shall die during my life, that then he shall have the land for ten years, and after my lessee be impleaded, B. may maintain him.

Sec. 14. And it hath been said, That not only those who have a contingency of such an interest, which it is in no man's power to bar them of, if the contingency happen, may justify such maintenance, but that those also shall have the same privilege, who by the act of God have the immediate possibility of such an interest, though it be in the power of another to deprive them of it; and therefore that an heir apparent, or the husband of such heir, may lawfully maintain the ancestor in an action concerning the inheritance of the land whereof he is seised in fee.

Sec. 15. But it is said, That the grantee of a reversion, before the late statute for amendment of the law which made all attornment needless, could not maintain the tenant of the land without attornment, because his possibility was wholly created by the act of the party, and could not be executed but by the voluntary attornment of the tenant, which there

is no remedy to compel him to make by the common law; perhaps the authority of this opinion may be questionable, especially if such grant were made for good consideration: or since those who have only an equitable interest in lands, may lawfully maintain others in actions relating to those lands, as shall more fully be shewn in the seventeenth section; and since the grantor in equity shall stand intrusted for theantee after the grant, and the tenant may be enforced by court of equity to attorn to him, I do not see any good reason why such grantee should be esteemed such a stranger to the land, that he may not lawfully defend an action concerning it, in the event whereof he is so nearly concerned.

Sec. 16. But it seems clear, that he who is bound to warrant lands, may lawfully maintain the tenant in the defence of his title, because he is bound by the warranty to render other lands to the value of those which shall be evicted.

11 H. 6. 41.
B. Main. 51.
2 R. Abr. 118.

Sec. 17. Also it seems to be agreed, that he who hath an equitable interest in lands or goods, or even in a chose in action, may lawfully maintain another in an action relating thereto; and therefore it seemeth to be clear, that a man may lawfully maintain (a) those who are infeoffed of lands in trust for him, an action concerning those lands, and that if he sell them to another, the vendee shall have the same privilege; also it hath been (b) resolved, that where A. was bound as a surety to B. and B. thereupon made a deed of gift of certain sheep to A. in order to save him harmless from the said bond, with implied trust that the sheep should be returned to B. if A. should not be damnified, and afterwards an action was brought against A. for the taking of sheep, B. might justify the main-
taining of him in respect of the said trust: also it seemeth to (c) certain, that the assignee of a bond, or other chose in action, being made over to him for good consideration, in satisfaction of a precedent debt, due *bona fide* to him, and not merely in consideration of the intended maintenance, may either maintain the obligee in an action brought by him for the debt, or commence an original action in his name, for he hath an equitable interest in the debt.

(a) 34 H. 6. 30.
15 H. 7. 2.
2 E. 4. 2.
B. Main. 19.
30.
(b) Noy 100.
Moor 620.
See 39 H. 6.
19. 6. 20.
F. Main. 14.

(c) 14 H. 6. 30.
15 H. 7.
Noy 52.
C. Eliz. 552.
1 Sid. 21.
B. Main. 9.

Sec. 18. Also it seemeth to be (d) agreed, that wherever any persons claim a common interest in the same thing, as in a way, church yard, or common, &c. by the same title, they may maintain one another in a suit relating to the same.

(d) 18 E. 2. 4.
B. Main. 41.
Hob. 92.
2 R. Abr. 118.
Noy 99.
Moor 562. 758.
1 Roll. 57.

Sec. 19. It is said, That he who is (e) bail for another, may take care to have his appearance recorded, but that he ought not to intermeddle any farther.

(e) 34 H. 6.
26.
14 H. 6. 6.
18 Ed. 4. 12.

Sec. 20.

(a) 20 H. 6.

6 Ed. 4. 5.

34 H. 7. 2.

(b) 6 Ed. 4. 5.

F. Main. 16.

(c) 21 H. 6.

15.

31 H. 6. 41. 42.

12 H. 6. 2.

19 Ed. 4. 32.

9 H. 6. 64.

9 Ed. 4. 32.

(d) 19 Ed. 4. 5.

9 Int. 564.

(e) 21 H. 6. 16.

9 Int. 564.

Vide sup. f. 14.

Sec. 20. As to the second of the said particulars, viz. How far some acts of this kind are justifiable in respect of kindred or affinity, it seems to be agreed, that whoever is in any way of kin or affinity to either of the parties, so long as the same (a) continues, or but related to him by being his (b) godfather, may lawfully (c) stand by him at the bar, and counsel and assist him, and also pray another to be of counsel to him, but that he cannot justify the laying out of any of his own (d) money in the cause, unless he be either (e) father, or son, or heir apparent to the party, or the husband of such an heiress.

As to the third of the said particulars, viz. How far some acts of maintenance are justifiable in respect of other relations, I shall consider. 1. How far a lord may maintain his tenant. 2. How far a tenant may maintain his lord. 3. How far a master may maintain his servant. 4. How far a servant may maintain his master. 5. How far one neighbour may maintain another.

(f) 11 H. 6. 39.

b. 40.

2 R. Abr. 117.

B. Main. 50.

(g) 18 Ed. 4. 2.

B. Main. 50.

(h) 9 H. 6. 64.

B. Main. 3.

(i) Co. Lit. 65.

(k) Co. Lit.

101, 384.

11 H. 6. 42.

2 R. Abr. 117.

(l) F. Main.

85.

Sec. 21. As to the first point it seems certain, that not only the (f) lord, but also the *cestui que use* of a feigniory, may come with the tenant to a trial in an assize against him, and stand by him and assist him, and also pray the sheriff to return an indifferent jury: Also it seemeth, that the (g) lord of a town in an action brought against the inhabitants, wherein a right to a common burying-place, claimed by them, is brought into question, may maintain them in the defence of their right, by shewing authentic evidence thereof to the jury: And in some (h) books it is said generally, that the lord may maintain his tenant, without saying, how far he may do it; and I do not find it any where expressly holden, that the lord may justify laying out his own money in defence of his tenant's title; but it seemeth the better opinion, that he may as well justify it as any other of the abovementioned acts of (i) maintenance; for the lord, by accepting a man for his tenant, seemeth to take him under his immediate (k) protection; and inasmuch as the lands were originally derived from the lord, and he hath the continual benefit of the services due from them, the law in many cases of (l) common right, obliges him to warrant them unto his tenant, and where it doth not oblige him, surely it will at least permit him to do it: But it seems clear, that he cannot maintain him in respect of any lands not holden of him.

(m) 11 H. 6.

42.

2 R. Abr. 1164

Sec. 22. As to the second point, viz. How far a tenant may maintain his lord, it is said, that he may justify (m) coming with his lord, and standing with him at a trial; but I cannot

not

not find any thing more relating to this matter in any of the books.

Sett. 23. As to the third point, *viz.* How far a master may maintain his servant, it is said, that the master may go along with his (*a*) servant, or with his (*b*) chaplain, being retained to live in his house with him, in order to (*c*) retain counsel, and that he may pray one to be of counsel for him, and also that he may go with him to the (*d*) trial and stand with him and aid him while the cause is tried, but ought not to speak in the court in favour of his cause. Also it is said, that if my servant be arrested in an action of (*e*) debt, I may assist him with money in order to keep him out of prison, that I may have the benefit of his service: But it is said that the master, in real actions, cannot justify laying out money for his servant, unless he hath some of his wages in his hand; which, if the servant be willing, the master may safely lay out on his behalf.

(*a*) *Het.* 79.
(*b*) 19 H. 6. 30.
(*c*) 28 H. 6. 7.
12 b. 13.
34 H. 6. 25. 26.
B. Main. 6, 14.
F. Main. 20.
Con. F. Main.
13.
(*d*) 19 H. 6.
30.
11 H. 6. 42.
2 R. Abr. 116.
Het. 79.
(*e*) 21 H. 7. 40.
Moor 814.
B. Main. 24.
31 H. 6. 9.
19 Ed. 4. 3.
2 R. Abr. 116.
Het. 79.
B. Main. 44. 32.

Sett. 24. As to the fourth point, *viz.* How far a servant may maintain his master, it seemeth clear, that a person generally retained by another as his servant to do all manner of services, and not for a (*f*) particular occasion only, may justify (*g*) riding about to speed his business, and going to (*h*) counsel in his behalf, and shewing his evidences to the counsel or to the jury, and (*i*) standing by him at a trial between him and another; but it is certain, that he cannot lawfully lay out any of his own (*k*) money to assist the master in his suit.

(*f*) 39 H. 6. 5.
6.
Con. Keil. 50.
(*g*) 19 E. 4. 3.
(*h*) 19 H. 6. 31.
(*i*) 11 H. 6. 42.
(*k*) 3 H. 6. 52.
54.
11 H. 6. 10, 11.

Sett. 25. As to the fifth point, *viz.* How far one neighbour may assist another, it seems clear, that a man may lawfully go with his (*l*) neighbour to inquire for a person learned in law, but that (*m*) he ought not to give him any money towards carrying on his suit.

19 E. 4. 3.
12 Ed. 4. 14.
(*l*) 19 E. 4. 3.
2 R. Ab. 118.

Sett. 26. As to the fourth instance wherein some acts of this kind are justifiable, *viz.* That relating to charity, it seems to be (*n*) agreed, that any one may lawfully give money to a poor man to enable him to carry on his suit. Also it hath been adjudged, that any one may safely go with a (*n*) foreigner who cannot speak English to a counsellor, and inform him of his case.

(*n*) 21 H. 6. 16.
1, H. 6. 64.
22 H. 6. 64.
22 H. 6. 35.
B. Main. 14.
(*n*) 19 E. 4. 3.
34 H. 6. 25.
15 H. 7. 2.
B. Main. 7.

As to the fifth instance wherein some acts of this kind may be justified, *viz.* that relating to the profession of the law, I shall consider, First, how far they are justifiable in a counsellor. Secondly, how far in an attorney.

Sett.

(a) 1 H. 6. 20.
11.
2 R. Abr. 116.
2 Inst. 564.
(b) F. Main. 8.
22 H. 6. 6.

Sec. 27. As to the first point, there is no doubt but that a (a) counsellor, having received his fee, may lawfully set forth his client's cause to the best advantage; but it is certain, that he can no more justify (b) giving him money to maintain his suit, or threatening a juror, than any other person.

(c) 23 H. 4. 16.
Keilw. 50.
Hob. 117.
2 Inst. 564.
2 R. Abr. 116.
F. Main. 21.
(d) 3 Mod. 98.
Vide 2 Danv.
487, 12, 13, 14.
Winch. 52.
2 Jon. 208.
C. Car. 159.
194.
Com. C. Eliz.
415, 459, 760.
Moot 366.
2 R. Abr. 114,
115.
(e) 2 R. Abr.
514.

Sec. 28. As to the second point, there is no doubt but that an attorney may (c) lawfully prosecute or defend an action in the court wherein he is an allowed attorney, in the behalf of any one by whom he shall be specially retained, and that he may assist his client, by laying out his own money for him to be repaid again, and also may maintain an action against him for the same by virtue of such a retainer, without any special promise. And it is said, also, that attorneys may justify such maintenance in other courts, wherein they are not (d) allowed attorneys, but that they cannot have an action for the money so laid out without a special promise, and that they are more justified by a general (e) retainer to prosecute for another all his causes, than if they were not retained at all; and it is certain that they ought not to carry on a cause for another at their own expence, with a promise never to expect a repayment. And it seems justly questionable, whether solicitors who are no attorneys, can in any case justify the laying out their money in another's suit.

2 R. Abr. 115.
Winch. 53.
2 Inst. 214.

Sec. 29. However it is certain, that no counsellor or attorney can justify the using any deceitful practice, in maintenance of a client's cause, and that they are liable to be severely punished for all misdemeanors of this kind, not only, by the common law, but also by statute; for it is enacted by Westminster 1. c. 29. "That if any serjeant, pleader, or other, do any manner of disceit or collusion in the king's court, or consent unto it, in disceit of the court, or to beguile the court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man. And if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at the least. And if the trespass require greater punishment, it shall be at the king's pleasure."

11 E. 4. 3.
B. Dis. 23.

Sec. 30. In the construction of this statute the following points have been holden. First, That counsellors, &c. who are not sworn, are as much within the meaning of it as serjeants, &c. who are sworn.

2 Inst. 215, 216.
Dyer 249.
2 Inst. 215.
F. N. B. 98.

Sec. 31. Secondly, That all fraud and falsehood, tending to impede upon or abuse the justice of the king's courts, are within the purview of it, as in the following instances:

Sec.

Sett. 32. First, Where an attorney sues out an *habere facias seisinam*, falsely reciting a recovery in a real action, where in truth there was no recovery at all, and by colour thereof puts the supposed tenant in the action out of his freehold.

Sett. 33. Secondly where one brings a *præcipe* against a poor man, knowing that he had nothing in the land, on purpose to get the possession from the true tenant.

Sett. 34. Thirdly, where one procures an attorney to appear for a man, and confess judgment without any warrant.

41 E. 3. 1.
2 Inst. 215.

Sett. 35. Fourthly, where one pleads a false plea, known to be utterly groundless, and invented merely with a design to delay justice, and abuse the court; and therefore it is said, that if a client desire his attorney to plead such a plea, the attorney ought to enter upon the roll, *non sum veraciter informatus, ideo nihil dicit.*

Dyer 361.
10 E. 4. 9.

Sett. 36. As to the third general point of this chapter. How far offences of this kind are restrained by the common law? It seemeth, that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said, that all offenders of this kind are not only liable to an (a) action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be (b) indicted as offenders against public justice, and adjudged thereupon to such fine and imprisonment, as shall be agreeable to the circumstances of the offence. Also it seemeth, that a court of record may commit a man for an (c) act of maintenance done in the face of the court.

2 Inst. 208, 212.

(a) 11 H. 6. 11.
2 Inst. 208.
2 R. Ab. 114.
3 H. 5. 8.

(b) 2 R. Abr. 114.
2 Inst. 208, 212.

(c) Hct. 79.

Sett. 37. As to the fourth general point of this chapter. How far offences of this kind are punished by the statute? It is enacted by 1 Edw. 3. c. 14. which was farther enforced by 20 Edw. c. 4. "That none of the King's ministers, nor no great man of the realm, by himself nor by other, by sending of letters, nor otherwise, nor none other great nor small, shall take upon them to maintain quarrels nor parts in the country, to the lett and disturbance of the common law."

Sett. 38. And it is farther enacted by 1 Rich. 2. c. 4. "That none of the King's counsellors, officers or servants, nor any other person within the realm of *England*, of whatsoever estate or condition they be, shall take or sustain any quarrel by maintenance, in the country or elsewhere, upon grievous pain, that is to say, the said counsellors and the king's

“ king’s great officers, upon a pain which shall be ordained by
 “ the king himself, by the advice of the lords of his realm;
 “ and other less officers and servants of the king’s as well in
 “ the exchequer, and all his other courts and places, as of his
 “ own meiny, upon pain to lose their offices and services, and
 “ to be imprisoned, and then to be ransomed at the king’s
 “ will, every of them according to their degree, estate, and de-
 “ fert : and all other persons through the realm, upon pain of
 “ imprisonment, and to be ransomed as aforesaid.”

F. Main. 24.

Sect. 39. In the construction of these statutes the following points have been holden : first, that maintenance of a suit in a court baron is as much within the purview thereof as maintenance in a court of record.

3 H. 6. 53, 54.
 B. Main. 1.
 F. Main. 18.

Sect. 40. Secondly, that *nul tiel record* is a good plea to an action of maintenance brought on these statutes ; and therefore, that he who barely assists another in taking out an original, which never is returned, is not liable to any such action.

Fitz. Maintenance 17, 26.

Sect. 41. Thirdly, that it is not material, whether the plaintiff in an action on the said statutes were nonsuited, or recovered in the action wherein the maintenance is supposed.

Reg. 182. b.

Sect. 42. Also it is certain, that he who fears that another will maintain his adversary, may by way of prevention have an original writ grounded on the said statute prohibiting him so to do.

21 Mod. 322.

Sect. 43. Also all persons are prohibited to give or receive any liveries or badges for maintenance, under severe penalties, by 1 Rich. 2. c. 7. 7 Hen. 4. c. 14. 13 Hen. 4. c. 3. 8 Hen. 6. c. 4. and 8 Edw. 4. c. 2.

Sect. 44. And it is further enacted by 32 Hen. 8. c. 9.
 “ That no person whatsoever shall unlawfully maintain, or
 “ cause or procure any unlawful maintenance in any action,
 “ demand, suit or complaint in any of the king’s courts of
 “ the chancery, *Whitehall*, or elsewhere, where any person
 “ shall have authority by virtue of the king’s commission, pa-
 “ tent or writ, to hold plea of lands, or to examine, hear or de-
 “ termine any title of lands, or any matter of witnesses, con-
 “ cerning the title, right, or interest of any lands, tenements,
 “ or hereditaments ; and also that no person whatsoever do un-
 “ lawfully retain, for maintenance of any suit or plea, any per-
 “ son or persons, or embrace any freeholders or jurors, or sub-
 “ orn any witness by letters, rewards, promises, or any other
 “ sinister labour or means, for to maintain any matter or cause,
 “ or to the disturbance or hindrance of justice, or to the pro-
 “ curement,

“ curement, by occasion of any manner of perjury by false verdict
 “ or otherwise, in any manner of courts aforesaid, upon pain
 “ to forfeit for every such offence ten pounds; the one moi-
 “ ety thereof unto the king, and the other moiety to him that
 “ will sue for the same by action of debt, &c.

Stat. 45. It seemeth that in an information on this statute Savil 41, 42.
 it is not sufficient to say, that the defendant maintained the
 party, without adding that he did it unlawfully.

Stat. 46. Also it is said to have been adjudged, That Noy 68.
 maintenance of a suit in a spiritual court, is neither within this C. Eliz. 594.
 nor any of the other abovementioned statutes concerning
 maintenance.

Stat. 47. Also it hath been holden, that in an information Savil 41, 42.
 on this statute, it is necessary to shew that a plea was depend-
 ing, and therefore that it is not sufficient to say that a bill was
 exhibited.

CHAPTER THE EIGHTY-FOURTH.

OF CHAMPERTY.

AND now we are come to the second species of mainte- 2 Inst. 208.
 nance, called champerty, which is the unlawful mainte- Co. Lit. 368.
 nance of a suit in consideration of some bargain to have part
 of the thing in dispute, or some profit out of it.

Stat. 2. Having shewn in the precedent chapter what shall
 amount to an act of maintenance, and how far all maintenance
 in general, and consequently champerty, is punishable by the
 common law; I shall only take notice in this place, how far
 this offence in particular is restrained by statute, and to that
 end shall set down in order the several statutes relating to it,
 and shew in what manner they have been expounded.

Stat. 3. And first, it is enacted by the statute of Westmin- 3 Edw. 1st.
 ster 1. c. 25. “ That no officers of the king by themselves
 “ nor by other, shall maintain pleas, suits, or matters hang-
 “ ing in the king’s courts, for lands, tenements, or other
 “ things, for to have part or profit thereof by covenant made
 “ between them: and he that doth, shall be punished at the
 “ king’s pleasure.”

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2 Inst. 208.

Sec. 4. In the construction of the statute these following opinions have been holden. First, that by the king's courts, therein mentioned, are intended only his courts of record.

F. N. B. 172.
2 Inst. 209. 563.

Sec. 5. Secondly, that under the word "covenant," which in a strict sense signifieth only an agreement by deed, all kinds of promises and contracts of this kind are included, whether they be made by writing or parol.

47 A. 52. 5.
47 E. 3. 9.

Sec. 6. Thirdly, that maintenance in personal actions to have part of the debt or damages, is as much within this statute, as maintenance in real actions for a part of the land.

F. N. B. 172.
2 Inst. 209.
47 E. 3. 9.
47 Aff. 5.
9 H. 7. 18.
F. Champ. 4.

Sec. 7. Fourthly, that maintenance in consideration of a rent granted out of land in variance, is within this statute, but that rent granted out of other lands is no way within the purview of it.

B. Champ. 2.

Sec. 8. Fifthly, that it hath been holden not to be material, whether he who brings a writ of champerty, did in truth suffer any damage by it, or whether the plea wherein it is alledged be determined or not.

(a) 21 E. 3. 52.
30 Ed. 3. 3. 4.
2 R. Aur. 113.
31.

Sec. 9. Sixthly. That the (a) maintenance of the tenant or defendant is as much within the meaning of the statute, as the maintenance of a demandant or plaintiff.

(b) 1 H. 7. 2.
B. Champ. 6.

Sec. 10. Seventhly, that (b) such grants only of part of the thing in suit, which are made merely in consideration of the maintenance are within the meaning of the statute, and not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered.

Sec. 11. And it is farther enacted by the statute of Westminster 2. c. 49. "That the chancellor, treasurer, justices, nor any of the king's counsel, no clerk of the chancery, nor of the exchequer, nor any justice or other officer, nor any of the king's house, clerk, nor lay, shall not receive any church, nor advowson of a church, land nor tencement in fee, by gift or by purchase, or to farm, nor by champerty, nor otherwise, so long as the thing is in plea before the king, or before any of his officers, nor shall take no reward thereof. And that he that doth contrary to this act, either himself, or by another, or make any bargain, shall be punished at the king's pleasure, as well he that purchaseth, as he that doth sell."

Sec. 2.

Sec. 12. In the construction of this statute the following opinions have been holden. First, that it extendeth only to the officers therein named, and not to any other persons. 2 Inst. 484, 485.

Sec. 13. Secondly, that it so strictly restrains all such officers from purchasing any land, hanging a plea, that they cannot be excused by a consideration of (a) kindred or affinity, and that they are within the meaning of the statute, by barely making such a purchase, whether (b) they maintain the party in his suit or not; (c) whereas such a purchase for good consideration, made by any other person, of any tenant, is no offence, unless it appear that he did it to maintain the party. (a) 2 Inst. 485.
(b) 2 Inst. 484.
50 Aff. 3.
B. Champ. 8.
F. Champ. 6.
(c) 22 E. 3.
10. b. 52.
2 Inst. 484.
F. N. B. 172.
D. E.

Sec. 14. And it is farther enacted by 28 Edw. c. 11. in the following words, "because the king hath heretofore ordained by statute. That none of his ministers shall take no plea for maintenance, by which statute other officers were not bounden before this time, the king will that no officer, nor any other, (for to have part of the thing in plea) shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and if any do and be attainted thereof, the taker shall forfeit unto the king so much of his land and goods, as doth amount to the value of the part that he hath purchased for such maintenance. And to obtain this, whosoever will, shall be received to sue for the king before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibited to have counsel of pleaders, or of learned men in law, for his fee, or of his parents and next friends." See also 33 Ed.
1. d. 3.
1 Rich. 2. c. 9.
1 Inst. 369.

Sec. 15. In the construction of this statute the following points have been holden. First, that a (d) conveyance executed, hanging a plea in pursuance of a bargain made before, is not within the meaning of it. (d) 30 Aff. 15.
8 L. 4. 13.
2 Inst. 563.
F. Champ. 13.
F. N. B. 172.

Sec. 16. Secondly, That champerty in any action at (e) common law, whether it be real, personal, or mixt, is within this statute: Also it seems the better opinion, that the purchase of and while a suit of (f) equity concerning it is depending, is within the purview of it. (e) 27 Ed. 39.
47 Eliz. 5.
2 Inst. 563.
F. Champ. 13.
Cor. 2 R. Abr.
113.

Sec. 17. Thirdly, that a (g) lease for life, or years, or a voluntary gift of land, hanging a plea, is as much within the statute as a purchase for money. (g) 8 E. 4. 13.
F. Champ. 10.
F. N. B. 172.

Sec. 18. Fourthly, that a surrender made by a (h) lessee to his lessor is not within the meaning of this statute; for since the lessor may lawfully maintain his lessee without such a sur- (h) F. N. B.
172.
2 Inst. 564.

render, as hath been more fully shewn in the precedent chapter, surely *a fortiori* he may do it after the surrender.

(a) 2 Inst. 564.
F. N. B. 172.

SecT. 19. Fifthly, that no (a) conveyance, or promise thereof, relating to lands in suit, made by a father to his son, or by any ancestor to his heir apparent, is within the statute, since it only gives them the greater encouragement to do what by nature they are bound to do.

(b) 13 H. 7. 17.
B. Champ. 3.

SecT. 20. That the (b) giving of part of the land in suit, after the end of it, to a counsellor for his wages, is not within the meaning of it, if it evidently appears, that there was no kind of precedent bargain relating to such gift; but it seems (c) dangerous to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty.

(c) 2 Inst. 564.

Vide 2b. p 382.

† *SecT. 21.* And it is enacted by 31 Eliz. c. 5. "that the offence of champerty may be laid in any county at the pleasure of the informer."

CHAPTER THE EIGHTY-FIFTH

OF EMBRACERY.

FOR the better understanding of the nature of embracery, I shall consider, first, What kind of maintenance comes under the notion of embracery. Secondly, What acts of this nature are altogether unlawful. Thirdly, In what circumstances some kinds of them may be lawful. Fourthly, How far this offence is restrained by the common law. Fifthly, How far by statute.

(a) F. N. B.
Co. Lit. 369.
Moor 815.

4 Comm. 140.
(b) 21 H. 6. 20.
22 H. 6. 5.
37 H. 6. 31.
B Dec Tant. 10,
11, 13.
Co. Lit. 369.
Moor. 815.

SecT. 1. As to the first point it seems clear, that (a) any attempt whatsoever to corrupt, or influence, or instruct a jury, or any way to incline them to be more favourable to the one side than to the other by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the trial of the cause, is a proper act of embracery, (b) whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false.

(c) 13 H. 4.
16. Moor 806.
C. Eliz. 816.
Co. Lit. 159.
369.

SecT. 2. (c) And the law so far abhors all corruption of this kind that it prohibits every thing which has the least tendency to it, what specious pretence soever it may be covered with.

and therefore it will not suffer a mere stranger, so much as to labour a juror to appear and act according to his conscience.

Sec. 3. Also it is said, that generally the giving of money to a juror (*a*) after the verdict, without any precedent contract in relation to it, is an offence favouring of the nature of embracery; because if such practices were allowable, it would be easy to evade the law, by giving jurors secret intimations of such an intended reward for their service, which might be of as bad consequence as the giving of money before-hand. But it seems clear, that the giving of jurors such a reasonable recompence, as is usually allowed them for their expenses in travelling, &c. and which may fairly be expected by them from either side that shall prevail, is no way criminal, because if no such allowance were to be expected, it would be often difficult to prevail with persons to serve on a jury at their own charge; and therefore by experience it hath been found necessary to permit the parties to give jurors some amends for their charges.

(*a*) 39 Aff. 19.
B. Dec. Tan. 14.

Sec. 4. It hath been adjudged, that the bare (*b*) giving of money to another to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually so distributed or not; also it is (*c*) clear, that it is as criminal in a juror, as in any other person, to endeavour to prevail with his companions to give a verdict for one side by any practices whatsoever, except only by arguments from the evidence which was produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict, are high offences of this nature; as where persons by (*d*) indirect means procure themselves or others, to be sworn on a *take* in order to serve one side.

(*b*) 22 H. 6. 5.
28 H. 6. 7. 12.
31 H. 6. 8. 9.
B. Main. 6. 14.
(*c*) 17 Ed. 4. 5.
18 Ed. 4. 4.
B. Main. 32.
39.

(*d*) 1 Saund.
301.

Sec. 5. As to the second point, *viz.* What acts of this kind are altogether unlawful. It seems clear, that neither the party himself, nor his counsel, nor attorney, nor any person whatsoever, can justify any indirect practices of influencing a jury, either by giving (*e*) or promising them money, or (*f*) menacing them, or, (*g*) instructing them in the cause before-hand, &c.

(*e*) 13 H. 4. 16.
17.
11 H. 6. 11.
2 R. Abr. 116.
6. 3.
(*f*) 19 H. 6.
31.
13 H. 4. 17.
(*g*) 2 Bulst. 25.
Noy 102.

Co. Lit. 362. Moor 815.

Sec. 6. As to the third point, *viz.* In what circumstances some acts of this nature may be lawful. It seemeth clear, that any person who may justify any other act of maintenance, may safely labour a juror to (*h*) appear and give a verdict according to his conscience, but that no other person can justify

(*h*) Dyer 48.
Co. Lit. 157.
369.
Moore 813.
Noy 102.

intermeddling so far, and that no one whatsoever can justify the labouring a juror (a) not to appear.

(a) Hob. 294.

Sec. 7. As to the fourth point, *viz.* How far offences of this kind are restrained by the common law, there can be no doubt but that they subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law. Also it seemeth, that if an act of embracery were not known before the trial of a cause, so that the party to whose prejudice it was intended, had no opportunity to prevent the ill effects of it, by challenging the juror who was practised upon, it will be a good ground to move the court to set aside the verdict.

Sec. 8. As to the fifth point, *viz.* How far offences of this kind are restrained by statute. It is enacted by 5 Edw. 3. c. 10. “that if any juror, in assizes, juries or inquests, take of the one party or of the other, and be thereof duly attainted, that hereafter he shall not be put in any assizes, juries or inquests, and nevertheless he shall be commanded to prison, and further ransomed at the king’s will. And the justices before whom such assizes, juries, and inquests shall pass, shall have power to enquire and determine according to this statute.”

Sec. 9. And it is farther enacted by 34 Edw. 3. c. 8. That in every plea, whereof the inquest or assize doth pass, if any of the parties will sue against any of the jurors, that they have taken of his adversary or of him, for to give their verdict, he shall be heard, and shall have his plaint by bill presently before the justices, before whom they did swear, and that the juror be put to answer without any delay; and if they plead to the country, the inquest shall be taken mainenant. And if any man other than the party will sue for the king against the juror, it shall be heard and determined as fore is said. And if the juror be attainted at the suit of other than the party, and make his fine, the party that sueth shall have half the fine; and that the parties to the plea, shall recover their damages by the assessment of the inquest. And that the juror so attainted have the prison of one year, which imprisonment the king granteth, that it shall not be paroned for any fine; and if the party will sue by writ, before other justices, he shall have the suit in the form aforesaid.”

Sec. 10. And it is further enacted by 38 Edw. 3. c. 12. “That if any jurors in assizes sworn, and other inquests to be taken between the king and party, or party and party, do any thing take by them or other, of the party, plaintiff,

“ or

“ or defendant, to give their verdict, and thereof be attainted
 “ by process contained in the said statute of 34 Edw. 3. be
 “ it at the suit of the party that will sue for himself, or for the
 “ king, or any other person, every of the said jurors shall pay
 “ ten times as much as he hath taken. And that he that will
 “ sue shall have the one hal, and the king the other half. And
 “ that all the embraceors to bring or procure such inquest in
 “ the county to take gain or profit shall be punished in the
 “ same manner and form as the jurors. And if the juror or
 “ embraceor so attainted, have not whereof to make gree in
 “ the manner aforesaid, he shall have the imprisonment of one
 “ year: and the intent of the king, of great men, and of the
 “ commons is, that no justice nor other minister shall enquire
 “ of office, upon any of the points of this article, but only at
 “ the suit of the party, or of other, as as afore is said.” See *Infra* 554.
 also the 32 Hen. 8. c. 9. sec 3. 6.

Sec. 11. In the construction of these statutes the following points have been holden: First, That all actions of *decies tantum* being founded on an offence supposed to have been committed in some former action appearing upon record, it will be a good plea in bar, either that there is no (a) such record at all, or that there is not any such (b) record by which it may appear that the juror was sworn, and that it is a good (c) exception in abatement of the writ, that there is a variance in the first record from that in the declaration in the present action; yet it is said, that it is not necessary to (d) shew the whole record in certain, but only so much of it as conveys the plaintiff to his action.

(a) 5 Ed. 4. 3.
 B. Dec. Tant. 2.
 11.
 (b) 37 H. 6. 31.
 B. Dec. Tant. 13.
 (c) 9 H. 6. 1.
 B. Dec. Tant. 1.
 (d) 34 H. 6. 4.

Sec. 12. Secondly, That it is not (e) sufficient to shew that the defendants took money in order to embrace a jury, without shewing also that they actually disposed of it accordingly.

(e) 37 H. 6. 31.
 F. N. B. 171.

Sec. 13. Thirdly, that the (f) plaintiff must shew in certain how much was received, or otherwise the court will not know for what sum to give judgment.

(f) Pl. Com.
 85.

Sec. 14. Fourthly, That the giving of money to a juror (g) after the verdict is not within the statute, unless there were some precedent contract relating to it.

(g) 39 Aff. 19.
 B. Dec. Tant. 14.

Sec. 15. Fifthly, That it is not (h) material whether the jurors gave any verdict or not, or if they did give one, whether it were true or false.

(h) 21 H. 6. 31.
 37 H. 6. 31.
 B. Dec. Tant. 10.
 13 F. N. B. 171.
 Co. Lit. 369.
 Dyer 95.

40 Ed. 3. 3.
36 H. 6. 28.
B. Dec Tant. 3, 4
F. N. B. 171
Finch 255.
21 H. 6. 20.

Sec. 16. Sixthly, That all the jurors and embracers may be joined in one action, notwithstanding they severally received different sums, because all was received in order to give the same verdict, which could not but be the entire act of all the jurors. But it seems, that each defendant ought to plead severally, that he did not take money in the manner as the plaintiff hath declared.

(a) B. Dec Tant. 1
18 Savil. 42.

Sec. 17. Seventhly, That the (a) defendants ought not to plead generally not guilty, but that they ought specially to deny the taking of the money, &c.

(b) 41 E. 3. 15.
44 E. 3. 36.
B. Dec Tant. 5, 7.

Sec. 18. Eighthly, That the plaintiff shall be paid the moiety of the money due to him on a judgment in *decies tantum* before the king, because the king's moiety is not due as a debt but as a fine; and wherever the king is intitled to a fine from the suit of a subject, the plaintiff shall first be satisfied.

(c) 7 H. 4, 2, 3.
43 E. 3. 16.
B. Dec Tant. 9,
19.

Sec. 19. Ninthly, That the husband (c) alone may bring a *decies tantum*, for an embracery in a former action brought by him and his wife, because by a *decies tantum* money only is to be recovered wherein the wife can claim no share.

(d) 41 Ed. 3. 9.
B. Dec Tant. 4.
1 R. Abr. 579.

Sec. 20. Tenthly, That he who buys land to maintain a suit at a lower price than it is known to be worth, is as much within the statute, for so much as the (d) land is worth more than he gave, as if he had received it in money.

(e) 5 E. 4. 2.
3. b. 2. c. 26.
64.
B. Dec Tant. 15.
C. Eliz. 158,
585.
11 Co. 65.
3 Inst. 194.
(f) 44 E. 3.
36.
B. Dec Tant. 7.

Sec. 21. Eleventhly, That this being a popular action may be barred by the (e) king's release, being made before any action brought, but that it cannot be barred by the release of the party grieved; and from the same ground also it follows, that the party grieved needs not in such action declare of any damages done to him by the embracery; but if he do, it is said that he (f) ought to lay them severally against each defendant, or else that his writ shall abate, unless he will release them: but perhaps there may be good reason to question this opinion, for why may not the damages be as well recovered, as the action jointly laid against all the defendants.

(g) 44 E. 3. 12.
47 E. 3. 4.
B. Dec. 6, 8.

Sec. 22. Twelfthly, That no (g) process of outlawry lies in this action, but only a *capias* or distress infinite, upon a *nihil* returned, and that such distress ought to be of the lands which the defendants had at the time of the writ of *decies tantum* purchased, and not of those which they had at the time of the inquest; and that no *capias* (h) into a foreign county lies against the jurors, because it shall be presumed that they are in the county wherein they were returned on the jury; but clearly this reason can no way be extended to the embracers: and perhaps it may be overfavourable to carry it so far in relation

(h) 47 E. 3. 4.

lation to the jurors, especially since the distress infinite can only affect the lands which they had at the time of the *decies tantum*, before which they may possibly have sold those which they had at the return of the *venire*; and why should not the sheriff's present return that the defendants have nothing in the county, over-balance the presumption chiefly grounded on the former return, with which the present is not inconsistent, being made at a subsequent time.

Vide 6 E. 4.
11. a.
2 R. Abr. 277.

CHAPTER THE EIGHTY-SIXTH.

OF THE OFFENCE OF BUYING OR SELLING A PRETENDED TITLE.

FOR the better understanding the offence of buying or selling a pretended title, I shall consider: how it is restrained by common law. And, how by statute.

Sec. 1. As to the first point. It seemeth to be a high offence at common law, to buy, or sell, any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under-rate. And it seemeth not to be material whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested. For all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary.

Moore 751.
Hobart 115.
Plowden 80.
88.

Sec. 2. As to the second point, *viz.* How far offences of this kind are restrained by statute. It is recited by 1 Rich. 2. c. 9. "That many persons having true title to lands, and also in personal actions were wrongfully delayed of their rights and actions, by means that the defendants did commonly make gifts and feoffments of their lands in debate, and of their goods, to lords, and other great men, against whom the said pursuants for menace that was made to them, neither could nor durst make their pursuits: and also that many persons often times used to disseise others, and anon after

after such disseisin to make divers feoffments, sometimes to lords and other great men to have maintenance, and sometimes to persons unknown, to the intent to delay the said disseisees, &c. And it is thereupon enacted, "that from thenceforth no gift, or feoffment, of lands, tenements, or goods, be made, by such fraud or maintenance; and that if any be in such wise made, they shall be holden for none and of no value; and that the said disseisees shall from thenceforth have their recovery against the first disseisor, as well of the lands and tenements, as of their double damages, without having regard to such alienations, so that the disseisees commence their suits within the year next after the disseisin done."

B. Feoffments
de terris, 1, 19.
Co. Lit. 369.

Sec. 3. In the construction of the statute it hath been holden: that feoffments of this kind are only void in respect of the disseisees, but that they are effectual between the feoffor and feoffee, &c.

† And it is enacted by stat. 13. Ed. 1. c. 49. "that no person of the king's house shall buy any title whilst the thing is in dispute; on pain of both the buyer and seller being punished at the king's pleasure."

Ll. Raym. 537.

Sec. 4. And it is further enacted by 32 H. 8. c. 9. "that no person or persons whatsoever shall bargain, buy, or sell, or by any ways or means, obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title, of any person or persons, in, or to any manors, lands, tenements, or hereditaments, but if such person or persons, which shall so bargain, sell, give, grant, covenant or promise the same, their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made; upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, to forfeit the whole value of the lands, tenements or hereditaments so bargained, sold, promised, covenanted, or granted, contrary to the form of this act. And the buyer or taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments so by him bought, or taken as is abovesaid. The one half of the said forfeitures to be to the king, and the other half to the party that will sue for the same in any of the king's courts of record, by action of debt, bill, plaint, or information. In which action, bill, plaint, or information, no essoin, protection, wager of law, nor injunction shall be allowed."

Sec.

Sett. 5. But it is provided by the said statute, "that it shall be lawful to any person, being in lawful possession, by taking of the yearly farm, rents, or profits, of, or for any manors, lands, tenements, or hereditaments, to buy, obtain, get, or have by any reasonable way or means, the pretended right or title of any other person or persons, hereafter to be made to, of, or in such manors, lands, tenements, or hereditaments, whereof he or they shall so be in lawful possession, any thing in the said act contained to the contrary notwithstanding."

Sett. 6. And it is farther provided, "that the said statute shall not extend to charge any person with any of the above-mentioned penalties, except such person be sued for the offence within one year."

In the construction of this statute the following opinions have been holden :

Sett. 7. I. That it is not material whether any suit be depending concerning the lands contracted for, or not, whereas the statutes set forth in the precedent chapters extended only to contracts concerning lands which were actually in suit. Plowd. 83.

Sett. 8. II. That in an action on this statute, the plaintiff needs not recite it, because the judges are bound *ex officio* to take notice of it, being of a public nature ; but that if he do recite it, he must, at his peril, take care to recite it certainly, because it is the ground of his action ; and the court will not aid him by intending that there is another statute to maintain his action, different from that whereon he himself hath founded it. Lit. Rep. 369.
B. 2. c. 25. l. 101.
Plowd. 84.
C. Car. 233.
Dyer 74.
Con. 1 And. 76.

Sett. 9. III. That in such an action against the buyer of a pretended title, it ought expressly to appear, that the defendant did know that the seller had not been in possession the year before ; and *vice versa*, that in such an action by the buyer the contrary ought to appear, for otherwise it may be intended, that he was *particeps criminis*, and therefore ought not to have any share of the penalty. 1 Leon. 167.
1 Burr. 300.

Sett. 10. IV. That it is not sufficient to shew, that the seller had not been in possession, &c. a year before, without expressly averring that he had a pretended right or title, because that is the point of the action. Lit. Rep. 369.
Dyer 74.
Plowd. 80, 88.
C. Car. 233.

Sett. 11. V. That is not (a) sufficient to set forth the value of the land at the time of the conveyance executed, without shewing the value at the time of the bargain, because the forfeiture is governed by the latter. (a) C. Car. 233.

Sett.

(a) 4 Co. 26.
Co. Lit. 369.
Moore 655.
Plowd. 8c, 88.
Dy. 74, 374.
(b) Co. Lit. 369.
Con. Mo. 206.
Dyer 374.
(c) Co. Lit.
369.

Sec. 12. VI. That a contract for (a) customary right to a copyhold estate, or for a lease for (b) years, is as much within the statute as a contract for the fee simple; for the words of the statute are, *any right or title*, and such contracts are as much within the mischief intended to be redressed by the statute as any others can be: but it is (c) said, that a lease for years made with an intent to try the title in ejectment, is not within the meaning of the statute, because it is in a kind of course of law, unless it be made to a powerful man to sway the cause.

Plowd. 81, 85.
Dyer 74.

Sec. 13. VII. That in an action for the making such a lease for years, is it not necessary precisely to set forth the commencement and end of it, because the plaintiff is supposed to be a stranger to it.

1 Leon. 166.
1 And. 76, 77.

Sec. 14. VIII. That a lease for years by one out of possession being made off the land, is as much within the statute as if it had been made upon the land, though it be wholly void in law; for it is a lease in reputation, and taken for such among the vulgar, and tends as much to disquiet the possession as if it had been effectual in law.

B. Main. 38.
Plowd. 88, 89.
Co. Lit. 369.

Sec. 15. IX. That no conveyance made by one, who hath the uncontested possession, and undisputed absolute propriety of lands, is any way within the meaning of the statute, because it no way favours of maintenance, and can be prejudicial to no one; from whence it follows, that a disseisor obtaining the release of the disseisee, or a mortgagor redeeming his land, are in no danger of the statute in respect of any contract by them made, concerning such land after such release or redemption.

Plowd. 88, 89.
Moore 655.

Sec. 16. X. That one who gains the possession of lands, by virtue of a judgment at law in affirmance of an ancient title, cannot come within the meaning of this statute in respect of any lease made of such lands; for it can never be imagined, that it was the intent of the statute to oblige all persons who should recover their lands, to occupy them themselves, which would be generally inconvenient, and often wholly impracticable; and therefore it must be admitted from the necessity of the case, that such persons may lawfully lease their lands and houses to proper tenants, to be manured and occupied for the usual rents: But if it shall appear, that the title to such lands is still contested notwithstanding such recovery, and that such lease was in truth designed for the maintenance of the title, I can see no reason why it should not be as much within the statute as any case whatsoever. However there seems to be no doubt, but that if a disseisee enter upon a disseisor, being in possession of the land under a pretended title, and immediately sell

sell it to a stranger, he is as much within the statute as if he had been out of possession at the time of such sale; for notwithstanding his entry was lawful, and he had both the absolute property and possession of the land, yet inasmuch as the disseisor claims a title to it, which is yet in dispute, such a sale by the disseisee seems within the intent of the statute, which meant absolutely to restrain all persons from transferring their disputed titles to any stranger whatsoever. But it is said, that such a sale by a father to his son and heir apparent, is excepted out of the general purview of the statute, by common reason, which by the ties of nature as well as of interest, obliges such a son to maintain his father; yet it hath been holden that such a sale to a brother of the half blood is within the statute.

1 Leon. 166,
167. Bat Co.
Lit. 369. seems
contrary.

Savil 95, 96.
1 Leon. 167.
Modera 656.

Sec. 17. XI. It is said that the abovementioned proviso, that "one, who is in lawful possession by taking the yearly rents or profits of lands, &c. may lawfully buy the pretended right of any other person by reasonable means," is no more than the law would have implied, if it had not been expressed; for such a contract cannot possibly be to the wrong of any one, and tends rather to quiet suits than to promote them. And from the like reason also it is said, that a disseisor may lawfully get the release of the disseisee, though his possession was unlawful; and it seems clear, that such a release cannot come within the meaning of the statute, if the disseisee had the true right, and no other had any pretence of title to the land; for in such case it is clear, that the end of the release is not for maintenance, but for the settlement of all disputes: But if such a disseisee had had but a contested title, and such release were intended only to enable the disseisor to defend himself with the dubious title of his disseisee, surely it cannot but be as much within the meaning of the statute, as any conveyance to one wholly out of possession. However it seems clear, that those instances in the said proviso, by which it is shewn how it shall appear, that the persons who are permitted to contract for pretended titles are in possession, as by the receiving of rent, &c. are only put for examples, and that those, who are any way whatsoever lawfully seised in possession, reversion, or remainder, are within the benefit of the proviso; but it seems clear, that they can only justify the taking such a conveyance as will strengthen the estate whereof they are seised, and that they cannot take a covenant from a stranger to convey the land to them, when he shall have recovered it on a pretended right, because such a covenant seems clearly to favour as much of maintenance, as if they had been strangers to the land.

1 Leon. 167.
Savil 94, 96.

Co. Lit. 369.

Co. Lit. 369. b.

Vide 2 Hawk.
page 382.

† *Stat.* 18. And it is enacted, by the 31 Eliz. c. 5. s. 4.
“ That the offence of buying titles may be laid in any county,
at the pleasure of the informer.”

APPENDIX THE SIXTEENTH.

CHAPTER THE EIGHTY-SEVENTH.

OF SEDUCING ARTIFICERS.

In the cases of
Rex v. Medcalf
and *Rex v.*
Knights, who
were convicted
by confession,
upon this statute,
on one information
for seducing four
different artificers
the court held that they
could inflict but
one punishment
it being but one
information.
Burr. 2226.

IT is enacted by 5 Geo. 1. c. 27. “ that whosoever shall con-
“ tract with, entice, endeavour to persuade or solicit any
“ manufacturer or artificer of, or in wool, iron, steel, brass,
“ or any other metal; clock-maker, watch maker, or any
“ other artificer or manufacturer of Great Britain, to go out
“ of this kingdom into any foreign country, out of the king’s
“ dominions. on conviction by indictment or information at
“ Westminster, or at the assizes, or at the quarter sessions,
“ shall be fined not exceeding 100*l.* and suffer three months
“ imprisonment; and whoever shall offend a second time shall
“ be fined at the discretion of the court, imprisoned twelve
“ months, and in both cases be confined until the fine be
“ paid. Provided the prosecution be within twelve months.”

† *Stat.* 2. And it is further enacted “ that if any of his ma-
“ jesty’s subjects within this kingdom, being such artificer or
“ manufacturer as aforesaid, shall go into any country out of
“ the king’s dominions, there to use or exercise, or to teach
“ any of the said trades, or manufactures to foreigners, or
“ who shall be so abroad, using or exercising the said trades
“ or manufactures beforementioned, and shall not return into
“ and continue in this realm, within six months next, after
“ warning shall be given to him by the ambassador, envoy,
“ resident, minister, or consul of the crown of Great Britain
“ in the country in which such artificer shall be, or by any
“ person authorised by any of them, or by a secretary of state,
“ he shall be incapable of taking any legacy devised to him;
“ or of being executor or administrator; or of taking any
“ lands, tenements, or hereditaments, by descent, devise, or
“ purchase; and also forfeit all his estate real and personal to
“ his majesty’s use; be deemed an alien, and out of the king’s
“ protection.”

† *Stat.* 3. It is also enacted “ that upon complaint on oath
“ to any justice of the peace, that any person is endeavouring
“ to

“ to seduce any such artificer, or manufacturer as aforesaid.
 “ Or that such artificer or manufacturer hath contracted, pro-
 “ mised, or is preparing to go abroad as aforesaid, he may
 “ send his warrant to bring the offender complained of before
 “ him or some other justice of the same county, and if it shall
 “ appear by the oath of one witness, or by confession that
 “ such person is guilty of any of the offences aforesaid, the
 “ justice may bind him over with sureties to appear at the
 “ next assizes, or quarter session, and in case he shall refuse
 “ to give such security, he shall be committed to the county
 “ gaol until delivered by due course of law. And if con-
 “ victed upon any indictment, of any such promise, contract or
 “ preparation to go abroad as aforesaid; he shall give satis-
 “ factory security not to go abroad, and be imprisoned until
 “ the same is given.”

† *Stat. 4.* To render the intent of the above recited statute more effectual. It is enacted by 23 Geo. 2. c. 13. “ that who-
 “ ever shall contract with, entice, persuade, or endeavour to
 “ persuade, solicit, or seduce any manufacturer, workman, or
 “ artificer of, or in wool, mohair, cotton, or silk, or of, or in
 “ any manufactures made up of these materials, or any
 “ of the said materials mixed one with another, or of, or in
 “ iron, steel, brass, or any other metal, or any clock-maker,
 “ watch-maker, or any other manufacturer, workman, or
 “ artificer, of or in any other of the manufactures of Great
 “ Britain or Ireland into any foreign country not within the
 “ dominions of or belonging to the crown of Great Britain,
 “ on conviction or information at Westminster, or by indict-
 “ ment at the assizes for the county, if in England, or the
 “ court of judicature, or any circuit court in Scotland, or by
 “ indictment or information in the king’s bench in Ireland,
 “ shall forfeit for every artificer 500 l. suffer imprisonment in
 “ the county gaol for 12 calendar months, and until the for-
 “ feiture shall be paid. And on a second or subsequent con-
 “ viction for the like offence, the offender shall forfeit one
 “ thousand pounds, and be confined for two years as aforesaid,
 “ prosecution to be within twelve calendar months.”

By Aston J.
 the punishment
 directed by this
 act is *perempto-*
ry and no *dis-*
cretion is left in
 the court. Bur-
 row 2026.

† *Stat. 5.* In the case of *Rex v. Cater*, who was convicted upon these statutes of seducing a *coach spring maker*, Lord Mansfield said that this latter act seemed to be a repeal of the former act; for it was made to supply its deficiencies.

4 Burrow 2026,
 and the cases
 there cited.

† *Stat. 6.* And it is enacted by 22 Geo. 3. c. 60. “ that
 “ whoever shall contract with, entice, persuade, or endea-
 “ vour to seduce or encourage any artificer, or workman,
 “ concerned or employed, or who shall have worked at, or
 “ been employed in printing calicoes, cottons, muslins, or
 “ linens

“ linens of any sort, or in making or preparing any blocks
 “ plates, engines, tools, or utensils for such manufactory, to
 “ go out of Great Britain to any parts beyond the seas, and
 “ shall be convicted thereof upon indictment or information
 “ in the court of king’s bench at Westminster, or by indictment at the assizes, court of justiciary, or circuit court in
 “ Scotland, as the case may be; shall for every artificer, forfeit
 “ 500*l.* and suffer imprisonment in the common gaol for 12
 “ calendar months, and until such forfeiture be paid. And
 “ in case of a subsequent offence of the same kind, every person so offending again, shall, upon the like conviction, forfeit 1000*l.* and be confined two years as aforesaid, half to the king, and half to the informer. But the prosecution must be in 12 months after the offence committed.”

† *Sec. 7.* And it is further enacted, by 25 Geo. 3. c. 67.
 “ That whoever shall contract with, entice, persuade, or endeavour to seduce or encourage any artificer or workman concerned or employed, or who shall have worked at or been employed in the iron or steel manufacturers in this kingdom, or in making or preparing any tools or utensils for such manufactory, to go out of Great Britain to any parts beyond the seas (except to Ireland) and shall be convicted by indictment or information in King’s Bench or by indictment at the assizes, gaol delivery, or quarter sessions for the county or place wherein such offence shall be committed, or the offender shall live or reside, or by indictment in the court of justiciary, &c. in Scotland, as the case may be, shall for every artificer forfeit and be punished in the manner last before directed; prosecutions to be within 12 months.” (1)

(1) *N. B.* For employing artificers in certain branches of manufacture, for the regulation of their wages; and for the punishments of their disobedience. Vide 4 Burn’s Justice, 124 to 177.

APPENDIX THE SEVENTEENTH

CHAPTER THE EIGHTY-EIGHTH.

OF ACTING PLAYS WITHOUT LICENCE.

IT is enacted by 10 Geo. 2. c. 28. “ That every person
 “ who shall for hire, gain, or reward, act, represent or
 “ perform, or cause to be acted, represented or performed
 “ any interlude, tragedy, comedy, opera, play, farce, or
 “ other entertainment of the stage, or any part or parts
 “ therein, in case such person shall not have any legal settlement in the place where the same shall be acted, represent-
 “ ed

“ ed or performed without letters patent or licence from the
 “ chamberlain shall be deemed a rogue and vagabond, and
 “ suffer accordingly, unless, having or not having a legal
 “ settlement, he shall for every such offence forfeit fifty
 “ pounds.”

† *Sec. 2.* And it is further enacted, “ That no person
 “ shall for hire, gain or reward, act, perform, represent, or
 “ cause to be acted, performed or represented any entertain-
 “ ment of the stage, or any new act, scene, or other part ad-
 “ ded to any old interlude or other entertainment of the
 “ stage, or any new prologue or epilogue unless a true copy
 “ thereof be sent to the Lord Chamberlain, fourteen days, at
 “ least, before the acting, representing or performing there-
 “ of, together with an account of the play-house or other
 “ place where the same shall be, and the time when the same
 “ is intended to be first acted ; signed by the manager, or one
 “ of the managers of such play-house or company of actors
 “ therein, on pain of fifty pounds.”

A copy of all
 dramas to be
 sent to the
 chamberlain.

† *Sec. 3.* And it is further enacted, “ That the Lord
 “ Chamberlain shall in his discretion, prohibit the acting,
 “ performing, or representing any interlude, tragedy, come-
 “ dy, opera, play, farce, or other entertainment of the
 “ stage, or any act, scene or part thereof or any prologue, or
 “ epilogue ; and every person offending against such prohibi-
 “ tion or against the provision of the foregoing section, shall
 “ forfeit 50*l.* and the manager’s licence, if one was granted,
 “ shall also be null and void.”

The acting of
 which he may
 prohibit.

† *Sec. 4.* And it is also enacted, “ That if any enter-
 “ tainment of the stage as above described shall be acted, re-
 “ presented or performed in any house or place where wine,
 “ ale, beer or other liquors shall be sold or retailed, the same
 “ shall be deemed to be acted for gain, hire, and reward.”

No plays to be
 acted in public
 houses.

† *Sec. 5.* And it is further enacted, “ That all pecuniary
 “ penalties shall be recovered in a summary way before two
 “ justices for the county or place where any such offence shall
 “ be committed, by confession, or on the oath of one witness
 “ or in any of the courts of record at Westminster by action,
 “ &c. Or before the court of session in Scotland, according
 “ to the locality of the offence, to be levied by distress and
 “ sale, for the equal benefit of the informer, and the poor,
 “ and for want of distress the offender shall be committed to
 “ any house of correction for the county or place, not ex-
 “ ceeding six months. But an appeal may be made to the
 “ next quarter sessions, whose order shall be conclusive. Pro-
 “ secution to be within six months, and the special matter
 “ may be given in evidence on the general issue.”

How the penal-
 ties may be re-
 covered.

APPENDIX THE EIGHTEENTH.
CHAPTER THE EIGHTY-NINTH.
OF EMBEZZLING NAVAL STORES.

For the offence
of embezzling
the king's ar-
mour, vide ante
p. 75.

In what man-
ner they shall
be marked.

Penalty for ha-
ving them in
custody.

(a) The goods
must be found
in the custody
of the offender;
for it is their
being so found
and not their
having them,
which consti-
tutes the of-
fence.
Id. Ray. 1105.

THE evidence, upon prosecutions for stealing and embezzling the king's stores, seldom amounting to more than that "such goods are marked with the king's mark, and found in the custody and possession of the person accused. And this want of direct proof, that the offender actually carried away the goods, tending to encourage this evil practice, it is enacted by 9 and 10 Will. 3. c. 41. s. 1. "That it shall not be lawful to or for any person or persons whatsoever, other than persons authorised by contracting with his majesty's principal officers or commissioners of the navy, ordnance, or victualling office for his majesty's use, to make any stores of war, or naval stores whatsoever, with the marks usually used to, and marked upon his majesty's said warlike and naval or ordnance stores; that is to say, any cordage of three inches and upwards, wrought with a white thread laid the contrary way, or any small cordage, to wit, from three inches downwards with a twine in lieu of a white thread, laid the contrary way as aforesaid, or any canvasses wrought or unwrought, with a blue streak in the middle, or any other stores with the broad arrow, by stamp, brand, or otherwise; upon pain of forfeiting such goods, and the sum of 200 l. together with costs of suit; one moiety to the king, the other moiety to the informer, to be recovered in any of his majesty's courts of record at Westminster."

† Stat. 2. And it is farther enacted par. 2. "That such person or persons in whole custody, possession, or keeping, such goods or stores marked as aforesaid, shall be found, (a) not being employed as aforesaid; and such person or persons who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of having such goods found in his custody, possession, or keeping, shall forfeit such goods, and 200 l. with the costs of the prosecution, to be equally divided between the king and the informer, and also suffer imprisonment until payment thereof, unless such person shall, upon his trial, produce a certificate under the hand of three or more of his majesty's principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, quantities, or weights of such goods as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession. And by par. 4. the com-
missioners

“missioners, upon selling any such stores, are empowered to grant such certificates, expressing the quantities of such stores, and the time when and where they were bought of the said commissioners, within 30 days after their sale and delivery. And the said purchaser may also grant certificates to the persons to whom *they* may sell the said stores.”

Unless under a certificate. Which the commissioners may grant.

† *Sect.* 3. And it is further enacted by 1 Geo. 1. s. 2. c. 25. s. 6. “That if any person shall counterfeit the hand of any officers of the navy to any paper whereby his majesty’s treasure may be disposed of, or shall knowingly produce the same, he shall be bound over by the said officers and commissioners, or any of them, until he find surety to appear at the next assizes, or quarter sessions, to be there proceeded against according to law.”

Counterfeiting certificates.

† *Sect.* 4. And it is farther enacted par. 5. “That if any be sued for discovering or seizing such stores, the general issue may be pleaded, and the special matter given in evidence. And in case upon the trial of such issue, the defendants shall prove the goods were marked as aforesaid, and the plaintiff shall not prove he was employed as aforesaid, and had such certificate as aforesaid, and did shew the same to the defendant before suit brought, the defendant shall be acquitted and receive treble costs, unless the defendant, upon the sight of such certificate did not deliver back all such goods and stores so seized in as good plight and condition as they were at the time of such certificate shewn.”

How prosecutions may be defended.

† *Sect.* 5. And it is farther enacted by 9 Geo. 1. c. 8. s. 3. “That if any person or persons shall be lawfully convicted of having in his, her, or their custody, any timber, thick stuff, or plank marked with the broad arrow, or concealing any timber, thick stuff or plank so marked, he shall suffer as an offender against 9 and 10 Will. 3. c. 41, above recited.”

Extended to timber, thick stuff and plank.

† *Sect.* 6. But it is provided by par. 4, “That any judge before whom any offender shall be convicted of any crimes before recited, enacted or mentioned in *this* act, may mitigate the penalty for the same.”

Judges may mitigate the penalty.

† *Sect.* 7. And it is further enacted par. 5. “That if any dispute arise between the persons upon whose informations or oaths any offender against this act, or the 9 and 10 Will. 3. c. 41. shall be prosecuted and convicted, touching any right or title to any of the forfeitures or penalties before-mentioned, or any part thereof, the judge or justice convicting shall examine and settle the same.”

How disputes respecting the forfeiture. Shall be settled.

† *Sect.* 8. And it is farther enacted by 17 Geo. 2. c. 40. s. 10. “That any judge at the assizes, or justices of the peace,

Before whom the offence may be tried.

(a) For the form of the indictment. Vide Crown Cir. Crompt. 358.

“ at the general quarter sessions, may hear, try, and determine, by indictment (a) or otherwise, all or any the crimes or offences mentioned in the said recited act of 9 and 10 Will. 3. c. 41. and 9 Geo. 1. c. 8. And that the said justices of assize or quarter sessions may impose any fine, not exceeding 200 l. on such offender, one moiety to the king, and the other moiety to the informer; and may mitigate the said penalty and forfeitures, inflicted by the said recited acts, or either of them, and commit the offender to the common gaol till paid. Or in lieu thereof may punish such offender corporally, by causing him to be publicly whipped, and committed to some house of correction to hard labour for three months, or for less time as to such judge of assize, or quarter session shall seem meet.”

Commissioners, &c. may act as magistrates.

† Stat. 9. And it is further enacted by 9 Geo. 3. c. 30. f. 5. “ That the treasurer, comptroller, surveyor, clerk of the acts, or any commissioner of the navy for the time being, may act as justices of the peace, to all intents and purposes in causing any person or persons who shall be charged with stealing or embezzling any naval stores, the property of his majesty, to be apprehended, committed and prosecuted for the same.”

APPENDIX THE NINETEENTH.

CHAPTER THE NINETIETH.

OF EXERCISING A TRADE WITHOUT SERVING AS APPRENTICESHIP.

4 Modern 145.
2 Keb. 403.
Cro. Car. 3:6.
Hobart 184.
Styles 223.
2 Roll. 576.

IT is enacted by 5 Eliz. c. 4. f. 31. “ That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery or manual occupation, to set up, occupy, use or exercise any craft, mystery, or occupation now used or occupied within the realm of England or Wales; except he shall have been brought up therein seven years at least as an apprentice in the manner and form as the act describes; nor to set any person to work in such mystery, art, or occupation being not a workman at this day; except he shall have been apprentice as is aforesaid; or else having served as an apprentice as is aforesaid, shall or will become a journeyman, or be hired by the year; on pain of forfeiting for every default forty shillings for every month; one moiety to the crown, the other to the prosecutor; to be sued for in any court of

“ record ; before justices of oyer and terminer ; any other
 “ justices, one to be of the quorum or president and council,
 “ by action of debt, information, bill of complaint or other-
 “ wife, &c. &c.”

Moor 886.

b. Eliz. 499.

1 Salk. 370.

611.

L. Raym. 767.

6 Mod. 220.

An information *qui tam* may be brought at the quarter sessions upon this statute. *Farrin v. Williams.* Cowper 369.

This statute extends to parishes. 1 Burr. 366. and to restrain the use of any trade which was then used or is mentioned in the third section of the act. 8 Co. 129. Salk. 611. As a draper Hard. 54. 2 Keb. 403. Sty. 223. Ironmonger C. Car. 316. Soap maker, knife haft maker. Hard. 54. Brewer 2 Cro. 178. Palmer 543. Baker 2 Roll. 376. Taylor 1 Lev. 243. Upholsterer Salk. 611. Point maker Cro. Car. 516. Spurrier 2 Cro. 179. Tyler 4 Mod. 145. Fellmonger Salk. 611. Tanner 2 Burr. 1035. Barber 1 Lev. 87. 2 Lev. 226. Cook 3 Co. 129. Nor is the freedom of the city any release from the restraint. 1 Saund. 311. Even if the party be alien or demizen. Hutton 132. Or has served as apprentice to another trade. Show. 266. Sed Vide 4 Leonard 9. 2 Bull. 190. Or though the widow of a qualified trader. Noy. 5. unless she assisted her husband seven years. Carth. 163. Nor does a service beyond the seas release the restraint unless the servant was indentured. Salk. 67. Sed Dub. So an unqualified master cannot employ a qualified servant. Show. 241. 3 Mod. 315. Salk. 610. Carth. 163. And when the indenture is exempted from the stamp duty of 8 Ann c. 9. s. 32. Vide 1 Will. 119.

But this statute does not extend to trades where no skill is required. 2 Bull. 190. 1 Roll. 10. Salk. 611. 1 Vent. 326, 346. 2 Lev. 230. Cro. Car. 499. And if an unqualified master has exercised the trade for seven years without interruption he shall not be sued. 2 Will. 168. Nor is a dormant partner, though unqualified, within the penalties of the act. 2 Will. 40. 1 Burr. 2. Nor a journeyman 4 Burr. 2449.

APPENDIX THE TWENTIETH.

CHAPTER THE NINETY-FIRST,

OF GRANTING FRAUDULENT PERMITS.

IT is enacted by 6 Geo. 1. c. 21. s. 11 and 12. “ That
 “ all distillers, makers or sellers of, or dealers in *spirituous*
 “ *liquors* (a) either British or foreign, shall make an entry
 “ in writing, of the places made use of by them respective-
 “ ly for the keeping or selling of such commodities, at the of-
 “ fice of excise within the limits whereof such place shall be
 “ situated, and also of all *such spirituous* liquors as shall be
 “ therein at the time of making such entry, on pain of for-
 “ feiture and penalty of 20 l.”

(a) Viz. brandy;
 arrack,
 rum, spirits or
 strong waters.

† Sect. 2. And it is further enacted, par. 13. “ That
 “ none of the said commodities shall be brought into such en-
 “ tered place without first giving notice thereof to the officer
 “ of excise of the division ; and producing to, and leaving
 “ with, the said officer an *authentic certificate*, that the duties
 “ have been actually paid, or that the same has been condemn-

“ ed as forfeited.—Or was part of the stock of some import-
 “ er or dealer whose warehouse or place shall be entered as
 “ afore said, expressing the quantity and quality thereof; and
 “ at what port or place the duties were so paid, or the commo-
 “ dity so condemned, or *of whose stock the same was part* upon
 “ pain of forfeiture.”

† *Sec. 3.* And it is further enacted, par. 15. “ That no *such*
 “ commodities shall be sold, uttered, or exposed to sale, either
 “ by wholesale or retail, but in some or one of the said ware-
 “ houses or places as afore said, on pain of 40 s. a gallon, &c.”

† *Sec. 4.* And it is further enacted, par. 16. “ That
 “ the officers of excise where such commodities shall be so
 “ sold, shall *upon the request of the seller*, without fee or re-
 “ ward, give to the respective buyers thereof certificates in
 “ writing signed by the said officers or officers expressing the
 “ quantities so sold, and the name and names of the respec-
 “ tive buyers, and sellers thereof; and that the duty on such
 “ article so sold has been paid, or that the same has been con-
 “ demned as forfeited; or was part of such dealer’s stock as
 “ afore said:—to satisfy the officer of excise of the respective
 “ divisions to which the same is intended to be carried.”

† *Sec. 5.* And it is further enacted, par. 17. “ That
 “ no *such commodities*, exceeding the quantity of one gallon
 “ shall be removed or carried from any part of this kingdom
 “ to another, by land, or by water, without such *permit or ut-*
 “ *tericate*, on pain of forfeiture.”

† *Sec. 6.* And it is further enacted, par. 18. “ That
 “ whoever shall have in custody above the quantity of sixty
 “ three gallons shall be deemed a dealer.”

† *Sec. 7.* But as dealers have frequently practised the trick
 of taking out false permits for the purpose of protecting and
 conveying such commodities which they had clandestinely run
 on shore; it is further enacted, by 11 Geo. 1. c. 30. l.
 10. “ That the said commodities (a) shall be removed with-
 “ in a certain time to be specified in such permit, and that the
 “ permit shall be returned to the officer from whom the same
 “ was had, and that in case, upon taking an account of the
 “ stock of the person, from or out of whose stock the com-
 “ modities mentioned in such permit are authorized to be re-
 “ moved, there shall not appear a sufficient decrease to an-
 “ swer the removal mentioned in such permit, the person
 “ from whose stock such permit granted the removal, shall
 “ forfeit the like quantity as shall be mentioned in such per-
 “ mit as afore said.”

(a) Coffee, tea,
 and chocol. &c.

† *Sec.*

† *Sec. 8.* And it is further enacted, “ That no person shall demand, take, or receive any permit as aforesaid, without special direction in writing, of the person, or his *known* servants, from, or out of, whose stock the said commodities are so to be removed, on pain of 50 l.”

† *Sec. 9.* By 23 Geo. 3. c. 70. s. 3, 4, 5. directions are given in what manner permits shall be taken out, and what particulars shall be specified in the request notes from the trader for that purpose.

† *Sec. 10.* The commissioners of excise for England and Scotland are also directed by the said statute, par. 8 “ To provide moulds for making of paper to be used for permits, which paper shall have the words EXCISE OFFICE, visible in the substance of such paper; and the said commissioners shall also provide plates engraved with certain marks, stamps and devices, to be varied from time to time as they shall think proper, for the printing, marking and stamping of the said paper.”

† *Sec. 11.* And it is further enacted by the said statute, 23 Geo. 3. c. 30. s. 9. “ That if any person or persons whatsoever (not being authorised by the respective commissioners so to do) shall make or cause or procure to be made, or shall knowingly aid or assist in the making or without being authorised or appointed as aforesaid, shall knowingly have in his, her or their custody or possession, without lawful excuse (the proof whereof shall lie upon the person accused) any frame, mould or instrument for the making of paper with the words, EXCISE OFFICE visible in the substance of such paper; or shall make, or cause, or procure to be made, or knowingly aid or assist in the making of any paper, in the substance of which the words, EXCISE OFFICE shall be visible; or if any person (except as before excepted) shall by an act, mystery or contrivance, cause or procure the said words, EXCISE OFFICE to appear visible in the substance of any paper whatever—Or if any person or persons whatever (not being appointed as aforesaid) shall engrave, cut out, or make, or shall cause or procure to be engraven, cast, cut, or made any plate or plates or other thing with any mark, stamp, or device thereon, in imitation of, or to resemble any mark, stamp, or device made and used by the direction of the said commissioners of excise, or the major part of them respectively, in manner as aforesaid (a) for the purpose of printing, stamping, and marking of the paper to be used for a permit or permits to accompany any exciseable commodity or commodities removing or removed from one part of this kingdom to any other

(a) Vide the 8th section of the act.

“ part thereof in pursuance of the several statutes requiring
 “ such permit, any person so offending in any of the cases
 “ aforesaid, shall on conviction be adjudged a felon, and suf-
 “ fer death without benefit of clergy.”

† *Stat. 12.* And it is farther enacted by the said statute par.
 10. “ That if any person or persons whatsoever, shall counter-
 “ feit or forge or cause to be counterfeited, or forged any per-
 “ mit for the removal of any exciseable commodity from one
 “ part of this kingdom to any other part thereof, for the re-
 “ moval of which a permit or certificate is by any act or acts
 “ of parliament now in force required ;—or if any person or
 “ persons shall knowingly or willingly give any false or untrue
 “ permit, or shall knowingly or willingly accept or receive
 “ any false or untrue permit with any such exciseable com-
 “ modity to be removed, or removed as aforesaid ; or if any
 “ person or persons shall fraudulently alter or erase any per-
 “ mit after the same shall have been given or granted by the
 “ proper officer of excise, or if any person or persons shall
 “ knowingly or willingly publish or make use of any such
 “ permit so counterfeited, forged, false, untrue, altered, or
 “ erased ; every person so offending shall (in lieu of any for-
 “ mer penalty) for each and every such offence forfeit five
 “ hundred pounds to be recovered in any court of record at
 “ *Westminster*, or in the court of exchequer in *Scotland*.”

(a) Vide supra
 section the 9th.

(b) Vide the
 case of James
 Wortl, convict-
 ed upon this
 clause Old Bai-
 liff's edition. 16
 J.uary, 1767.

† *Stat. 13.* And it is further enacted, par. 11. “ That
 “ if any officer of excise or other inland duties shall deliver out,
 “ or suffer to be delivered out, any paper having the words,
 “ EXCISE OFFICE visible in the substance thereof either be-
 “ fore or after the stamp or mark so to be provided as aforesaid
 “ (a) shall be printed thereon, or before the same shall be fil-
 “ led up agreeable to the request note, brought from any
 “ trader for the purpose of having a permit for the removal
 “ of some exciseable commodity ; or if any such officer shall
 “ knowingly give or grant any false or untrue permit ; or
 “ shall make any false or untrue entry in the counter-part or
 “ counter-parts of any permit or permits by him given or
 “ granted for the removal of any exciseable commodity
 “ from the stock of any dealer therein ; or shall knowingly
 “ and willingly receive or take any exciseable commodity
 “ whatsoever into the stock of any such dealer, brought in
 “ with any false, forged, or untrue permit, or shall know-
 “ ingly permit or suffer the same to be done, directly or in-
 “ directly, contrary to the true intent and meaning of the
 “ several statutes (b) in such case made and provided, every
 “ such officer so offending shall, on conviction, be adjudged
 “ guilty of felony and shall be transported, not exceeding
 “ seven years.”

APPEN-

APPENDIX THE TWENTY-FIRST.

CHAPTER THE NINETY-SECOND.

OF SURCHARGING BOATS, &c.

FOR preventing the losing of lives of persons passing on the river Thames between Gravesend and Windsor, it is enacted by 10 Geo. 2. c. 31. s. 8. "That no person or persons who shall work or navigate any tilt boat, row-barge, or any other boat or wherry for hire or gain shall receive, take into or carry in any such tilt, or row-barge at one and the same time any more than 37 passengers, and three more passengers only by the way—nor shall receive take into or carry in any other boat or wherry any more than eight passengers and two more only if called in by the way, nor shall receive take into or carry in any ferry-boat or wherry allowed to work on *Sundays* any more than eight passengers at one and the same time; on pain of 5*l.* for the first offence 10*l.* for the second offence, and for the third offence shall be disabled to work any boat or vessel, &c. and be disfranchised of the waterman's company for twelve months, on conviction by one witness before one magistrate."

† *Sec.* 2. And it is further enacted, "That in case any greater number of persons shall be received, taken into, or carried in any such tilt boats, row-barges, ferry boats, or other boats or wherries than are respectively allowed to be carried as aforesaid and any passenger or passengers shall then be drowned, every such person or persons who shall work or navigate such tilt boats, row-barges, ferry-boats, or other boats or wherries offending therein, shall be deemed guilty of felony and transported as felons."

APPENDIX THE TWENTY-SECOND.

CHAPTER THE NINETY-THIRD.

OF VAGRANTS.

IT is enacted by 17 Geo. 2. c. 5. "That all persons who threaten to run away and leave their wives or children to the parish—And all persons who shall unlawfully return to such parish or place from whence they have been legally removed by order of two justices without a certificate from the place whereunto they belong.—And all

Idle and disorderly persons.

“ all persons who, not having wherewith to maintain themselves, live idle without employment, and refuse to work for the usual and common wages given to other labourers for the like work in the parishes or places where they are.
 “ And all persons going about from door to door or placing themselves in the streets, highways or passages to beg or gather alms in the parishes or places where they dwell shall be decreed—IDLE AND DISORDERLY PERSONS.”

† *Sec. 2.* And it is further enacted, “ That any justice may commit such offender, on conviction before him, by his own view, their confession, or the oath of one witness, to the house of correction not exceeding one month.”

(a) For which the justice may order the overseer to pay him 5 s. vide 4 Burr. 335.

† *Sec. 3.* And any person may apprehend (a) and carry before a justice any such persons going about from door to door or placing themselves in streets, highways or passages to beg or gather alms in the parishes or places where they dwell; and if they resist or escape they shall be punished as—ROGUES AND VAGABONDS.

Rogues and vagabonds.—For another species of rogues and vagabonds. Vide 23 Geo. 3 c. 88. ante page 148. and 105.

(b) Vide 4 Burns Justice 333. and ante p. 198.

(c) Vide 4 Burn's Justice, 335.

(d) This shall not extend to the 31 Eliz. c. 17. Vide ante page 183.

† *Sec. 4.* And it is further enacted, par. 2. “ That
 “ all persons going about as patent gatherers or gatherers of alms, under pretences of loss by fire or other casualty—
 “ or going about as collectors for prisons, gaols, or hospitals;
 “ all fencers or bearwards, all common players of interludes,
 “ all persons who shall for hire, gain or reward, act, represent or perform, or cause to be acted, &c. any entertainment of the stage or any part or parts thereof not being authorised by law, all minstrels (b) and jugglers, all persons pretending to be gypsies, or wandering in the habit or form of Egyptians, (c) or pretending to have skill in physiognomy, palmistry, or like crafty science, or pretending to tell fortunes, or using any subtle craft to deceive and impose upon any of his majesty's subjects, or playing or betting at any unlawful games or plays; and all persons who run away and leave their wives and children whereby they become chargeable to any parish or place—and all petty chapmen and pedlars wandering abroad without licence, and all persons wandering abroad and lodging in alehouses, barns, out-houses, or in the open air not giving a good account of themselves—and all persons wandering abroad and begging, pretending to be soldiers, mariners, sea-faring men, (d) or pretending to go to work in harvest.—And all other persons wandering abroad and begging shall be deemed—ROGUES AND VAGABONDS.”

Incorrigible rogues.

† *Sec. 5.* And it is further enacted, par. 4. “ That all end gatherers convicted according to 13 Geo. 1. c. 23.—
 “ And

“ And all persons apprehended as rogues and vagabonds, and
 “ escaped from the persons apprehending them, or refusing to
 “ go before a justice, or to be examined upon oath, or refu-
 “ sing to be conveyed by such pafs as this act mentions, or
 “ knowingly giving a false account of themselves upon such
 “ examination, after warning given them of their punishment.
 “ And all rogues and vagabonds who shall break or escape out
 “ of any house of correction when confined by virtue of this
 “ act. And all persons who after having been punished as
 “ rogues and vagabonds and discharged shall again commit any
 “ of the said offences shall be deemed—INCORRIGIBLE
 “ ROGUES.”

† *Sett.* 6. And it is further enacted, par. 5. “ That any
 “ person may apprehend the offender and carry him before a
 “ justice (a) and in case he shall be charged by a justice so to
 “ do, and shall not use his best endeavours for such purpose he
 “ shall forfeit ten shillings.”

(a) For which
 the justice may
 order a reward
 of 10 s. to be
 paid by the
 county.

† *Sett.* 7. And it is further enacted, par. 6. “ That
 “ two justices shall meet four times in the year or oftner if
 “ need be, in their respective divisions, and by warrant com-
 “ mand the constable, &c. to make a general privy search in
 “ one night, for the apprehending of ROGUES AND VAGA-
 “ BONDS. And every justice on information shall issue his
 “ warrant to apprehend rogues and vagabonds within his ju-
 “ risdiction.

Privy search,

† *Sett.* 8. And it is further enacted, par. 7. “ That the
 “ justice shall inform himself by the examination on the oath
 “ of the person so apprehended, or of any other person, of
 “ the condition and circumstances of such person and where
 “ he was last legally settled; the substance of which shall be
 “ put into writing and subscribed by the person examined, and
 “ by the justice who shall transmit the same to the next quar-
 “ ter session—And such justice shall order the person so appre-
 “ hended to be *publickly* whipped (b) and sent to the house of
 “ correction until the next quarter session or for any less time,
 “ or convey him by pass under hand and seal to the last place
 “ of legal settlement; but if it cannot be found then to the
 “ place of birth, or if such person be under the age of four-
 “ teen years, and have any father or mother living then to
 “ their place of abode there to be delivered to the parish
 “ officers, a duplicate of which pass and examination shall
 “ be filed at the next quarter sessions.”

Examination.

Punishment.

(b) Vide 22
 Hen. 8. c. 13.
 39 Eliz. c. 4.

† *Sett.* 9. And it is further enacted, par. 9. “ That
 “ where any offender shall be committed till the next session,
 “ and the justices shall adjudge such person a rogue and vaga-
 “ bond, or an incorrigible rogue they may order him to be
 “ detained

Further punish-
 ment.

Transportation. "detained in the house of correction not exceeding six months, and such incorrigible rogue for any further time not exceeding two years nor less than six months, and whipped, and afterwards be sent away by such pass *mutatis* *mutandis* as aforesaid.—And if such person *being a male* is above the age of twelve years the session may send him to be employed in his majesty's service either by sea or land. And in case any such incorrigible rogue shall break or escape from the house of correction, or shall offend again in like manner he shall be transported for seven years."

† *Seet.* 10. And it is enacted by 13 and 14 Car. 1. c. 12. "That the justices in sessions may transport such rogues, vagabonds, and sturdy beggars, as shall be convicted and adjudged to be incorrigible."

Vagrant children.

† *Seet.* 11. And it is also enacted by 17 Geo. 2. c. 5. l. 28. "That if the child of any vagrant above seven years of age shall be committed to the house of correction, the justices in sessions may order such child to be placed out as a servant or apprentice untill the attainment of 21 years or for a less time, and if any offender found wandering with such child, shall be again found with the same child so placed out, he shall be deemed an INCORRIGIBLE ROGUE."

† *Seet.* 12. And it is further enacted, "That where any vagrants have been committed to the house of correction till the next sessions, if on examination of such persons no place can be found, to which they may be conveyed, the sessions shall order them to be detained and employed in such house of correction until they can provide for themselves, or until the justices in sessions can place them in some lawful calling as servants or apprentices, soldiers, mariners or otherwise."

(a) The act prescribes the form of the certificate

† *Seet.* 13. And it is further enacted, par. 10. "That the justice who shall make the pass, shall at the same time deliver to the officer appointed to convey *the vagrant* a note or certificate (a) ascertaining how they are to be conveyed, by horse, cart, or on foot, and what allowance such officer is to have, according to the rates appointed by the session. By sect. 16. Which rates the justices are authorised to make as they shall think proper."

Conveying of vagrants.

† *Seet.* 14. And it is further enacted, par. 11. "That the officer shall convey the person accordingly, the next direct way to where he is ordered to be sent, if in the same county, riding, division, corporation or franchise; if not he shall deliver the person to the constable of the first place in the next county, &c. &c. in the direct way to the place whither he is to be conveyed, together with the pass and duplicate of the examination, taking his receipt for the same.

And

“ And such constable shall immediately apply to some justice
 “ of the division who shall make the like certificate and deli-
 “ ver it to such constable who shall with all speed convey such
 “ person unto the first parish, town or place in the next coun-
 “ ty or division in the direct way to the place to which he is
 “ to be conveyed. And so from one county or division to
 “ another, till they come to the place to which such person is
 “ sent, and the constable who shall deliver such person to the
 “ churchwarden or other person ordered to receive him, shall
 “ at the same time deliver the said pass with the duplicate of
 “ the examination, taking their receipt for the same.”

† *Sec. 15.* And it is further enacted, par. 12. “ That Vagrants may
be searched.
 “ any justice may order the vagrant to be searched, and his
 “ bundles to be inspected in his presence; and if he shall be
 “ found to have sufficient for his passage, either in whole or
 “ in part, the justice shall order so much of the money to be
 “ paid, or, if other effects, to be sold towards taking up and
 “ passing such vagrant, &c.”

† *Sec. 16.* And it is further enacted, par. 17. “ That if Duty of the con-
stable.
 “ any petty constable shall bring to any high constable such
 “ certificate as aforesaid, together with a receipt or note
 “ from the constable to whom the person was delivered, the
 “ said high constable shall pay the rates ascertained by such
 “ certificate, taking the petty constable’s receipt; the high
 “ constable to be allowed the same on passing his accounts, on
 “ his delivering up such certificate and receipt, and giving his
 “ own receipt for the same to such treasurer; the same to be
 “ allowed the treasurer in his accounts on delivering up the
 “ vouchers as aforesaid, and if the high constable shall refuse
 “ or neglect to pay the same on demand, it shall be lawful for
 “ one justice, by his warrant, to levy double the sum by dis-
 “ tress, and thereout to allow the petty constable the sum as-
 “ certained by the certificate and such other recompence for
 “ his trouble, loss of time, and expences as the justice shall
 “ think fit; the overplus to be returned to the constable on
 “ demand. And in cities, towns corporate and other places
 “ where there is no high constable, the petty constable shall be
 “ allowed what he shall so pay pursuant to such certificate in
 “ his accounts on delivering up such vouchers; or if any mas-
 “ ter of a house of correction shall deliver such certificate
 “ and receipt to the treasurer, the treasurer shall pay the same
 “ to him taking his receipt for the same and be allowed the
 “ same in his accounts, &c.”

† *Sec. 17.* And it is enacted by 26 Geo. 2. c. 34. s. 2. Expences of con-
veying.
 “ That when the high constable hath not money in his hands
 “ sufficient to answer the said expences the treasurer shall pay
 “ the

“ the same to such petty constable on his producing the certificate and such other vouchers as aforesaid.”

Penalty of counterfeiting certificate.

† *Secl.* 18. And it is further enacted, by 17 Geo. 2. c. 5. f. 18. “ That if any petty constable or governor of any house of correction shall counterfeit any such certificate or receipt, or knowingly permit any alteration to be made therein he shall forfeit 50*l.* And if he shall not convey such vagrants, or not deliver them to the proper person ; or if any constable shall refuse to receive any such person, or to give such receipt he shall forfeit 20*l.* by distress and sale by warrant of the justices in sessions where the offence shall be committed ; half to the informer and half to the treasurer, to be applied by him as part of the public stock.”

Vagrant to be set to work.

† *Secl.* 19. And it is further enacted, par. 19. “ That the parish or place to which any rogue, vagabond, or incorrigible rogue shall be conveyed shall employ in work, or place in some work-house or almshouse the person so conveyed until he shall betake himself to some service or other employment, and if he shall refuse to work, &c. the overseers may carry him before some justice to be sent to the house of correction to hard labour.”

Vide the case of *Rex v. Ringwood*. Burr. Sett. Cases 240.

† *Secl.* 20. And it is further enacted, par. 11. “ That if the churchwarden or other person who shall receive any person so sent shall think the examination to be false he may carry the person so sent before a justice, who, if he see cause may commit such person to the house of correction till the next sessions ; and the justices there may deal with such a person as an incorrigible rogue. But he shall not be removed from the place to which he is sent, but by order of two justices, in the same manner as other poor persons are removed to the place of their settlement.”

Scottish vagrants

† *Secl.* 21. And it is further enacted by the said statute, par. 13. “ That the constable of any parish or place within the counties of *Cumberland*, *Northumberland*, *Durham*, or the town of *Berwick* shall, on any person being so delivered to him by a pass and examination, whose place of legal settlement is in *Scotland* deliver the examination to the clerk of the peace ; and convey such person with the pass, and deliver him to some constable or other officer of the next parish, district or place within the next adjoining shire, stewartry or place, taking his receipt for him ; and if any such vagrant, after being so conveyed into *Scotland* shall be found wandering, begging or misbehaving himself in *England* he shall be deemed an incorrigible rogue.”

Irish vagrants.

† *Secl.* 22. And it is further enacted, par. 14. “ That any master of a vessel bound for *Ireland*, the *Isles of Man*, *Jersey*, *Guernsey* or *Scilly* shall, on warrant to him directed

“ ed, under the hand and seal, of a justice of the place
 “ where such vessel shall lie, take on board such vagrant as
 “ shall be expressed in the warrant, and convey him to such
 “ place; and for the charges thereof the constable who
 “ serves him with the warrant shall pay him such rate by
 “ the head, as the justices in sessions shall appoint, and such
 “ master shall on the back of the warrant sign a receipt for
 “ the money so paid, and also for the vagrant so delivered.
 “ Which warrant so indorsed shall be produced to the justice
 “ who signed and sealed the same, and, upon his allowance
 “ thereof, under his hand, the money so paid shall be re-paid
 “ by the county, as other money for conveying vagrants.
 “ And such master neglecting or refusing to transport such
 “ vagrants, or to indorse the receipt, shall forfeit 5 *l.* to the
 “ poor of the parish or place where the offence shall be com-
 “ mitted, to be levied by distress and sale of the ship or any
 “ goods within the same, by warrant of one justice, return-
 “ ing the overplus on demand after the penalty and charges of
 “ the same are satisfied. But no master shall be compelled to
 “ take on board more than one vagrant for every 20 tons
 “ burthen.”

How such va-
grants shall be
conveyed.

† *Sec. 23.* And it is further enacted, par. 20. “ It shall
 “ be lawful for any two justices where any dangerous luna-
 “ tic or mad person shall be found by warrant under their
 “ hands and seals, directed to the constables, churchwardens
 “ and overseers of the poor of the parish or place, or some of
 “ them, to cause such person to be apprehended and kept
 “ safely locked up in some secure place within the county or
 “ precinct, as such justices shall under their hands and seals
 “ direct and appoint; and (if necessary) to be there chained,
 “ if the last legal settlement of such person shall be within
 “ such county or precinct; and if such settlement shall not
 “ be there, then such person shall be sent to the place of his
 “ or her last legal settlement by a pass *mutatis mutandis* as
 “ aforelaid, and shall be locked up or chained by warrant of
 “ two justices of the county or precinct to which such per-
 “ son is so sent; and the reasonable charges of removing,
 “ and of keeping, maintaining and curing such persons dur-
 “ ing such restraint (which shall be only during such lunacy
 “ or madness) shall be satisfied and paid (being first proved
 “ upon oath) by order of two justices directing the church-
 “ wardens or overseers where any goods, chattels, lands or
 “ tenements of such person shall be, to seize and sell so much
 “ of them or receive so much of the annual rents of the lands
 “ and tenements as is necessary to pay the same and to account
 “ for what is so seized, sold, or received to the next quarter
 “ sessions. But if such person hath not an estate to pay or
 “ satisfy the same, over and above what shall be sufficient to
 “ maintain

How lunatick
vagrants may be
disposed of,

N. B. This act
shall not restrain
any former
rights over the
persons of lu-
naticks.

" maintain his or her family, then such charges shall be paid
 " by the place to which such person belongs by order of two
 " justices directed to the churchwardens and overseers."

Penalty of lodg-
 ing vagrants.

† *Sec. 24.* And it is further enacted, par. 23. " That
 " if any person shall knowingly permit any rogue, vagabond,
 " or incorrigible rogue to lodge or take shelter in his house or
 " barn or other out-house or building and shall not apprehend
 " and carry him before a justice, or give notice to the constable
 " so to do; and shall be convicted thereof by confession,
 " or oath of one witness, before one justice, he shall forfeit
 " not exceeding 40 s. nor less than 10 s. half to the informer
 " and half to the poor by distress and sale; and if any
 " charge shall be brought on any parish or place by means of
 " such offence, the same shall be answered to the said parish
 " or place by such offender and be levied by distress and sale
 " of his goods as aforesaid: And if sufficient distress cannot
 " be found, such offender shall be committed to the house of
 " correction by the justice, for any time not exceeding one
 " month."

Children born
 in vagrancy.

† *Sec. 25.* And it is further enacted, par. 25. " That
 " where any woman shall be delivered of a child or children
 " and become chargeable to the parish or place, the church-
 " wardens or overseers may detain her until they can safely
 " convey her to a justice; who shall examine her and commit
 " her to the house of correction until the next sessions, who
 " may order her to be publicly whipped and detained for any
 " further time not exceeding six months, and upon applica-
 " tion by the churchwardens and overseers of the place where
 " she was so delivered, the justices at such sessions shall order the
 " treasurer to pay them a reasonable sum, for the charges
 " such place has been put to on her account, and if she shall
 " be detained and conveyed to a justice as aforesaid; the
 " child of which she is delivered, if a bastard, shall not be
 " settled where so born, nor be sent thither for want of other
 " settlement, by a pass, by virtue of this act; but the settle-
 " ment of such woman shall be deemed the settlement of such
 " child."

Mr. Burn says,
 the justice must
 make a record
 of the whole
 proceeding in
 order to give the
 time in evidence
 if the settlement
 should be after-
 wards contested.

Note. By sect. 22. whoever shall neglect his duty, or resist the execution of this act shall forfeit not exceeding 5 l. nor under 20 s. By sect. 33. the charges of apprehending, conveying, and maintaining offenders shall be included in the county rate. By sect. 26. an appeal is given to the next quarter sessions which shall be final. And by sect. 34. the power of *special franchises* with regard to vagrants, is excepted from this act.

A

T A B L E

O F

PRINCIPAL MATTERS,

CONTAINED IN THE

F I R S T V O L U M E.

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- 21 By 10 Geo. 2. c. 32. to set fire to any coal-mine, felony without clergy *ibid.* f. 5

- 22 By 9 Geo. 3. c. 29. to burn any mill, felony without clergy; but the prosecution must be within eighteen months *ibid.* f. 6

- 23 For other offences by burning *ibid.* (N)

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- 3 The court can inflict but *one* penalty on *one* information, although against *several* offenders *ibid.* (N)

- 4 Or if such artificer, using his trade abroad, shall not return home on notice given him he shall lose his *liberam legem*, &c. f. 2

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A TABLE OF PRINCIPAL MATTERS.

- | | |
|---|--|
| <p>he shall be imprisoned till he gives security Page 559</p> <p>6 By 23 Geo. 2. c. 13. to seduce any manufacturer in wool, mohair, cotton or silk; &c. or any artificer as above mentioned, incurs a penalty of 500<i>l.</i> and imprisonment for twelve months for the first offence, and 1000<i>l.</i> and two years for the second f. 4</p> <p>7 A coach spring maker is within this statute f. 5</p> <p>8 By 22 Geo. 3. c. 60. to seduce any workman in the printing calicoes, muslins, cottons, &c. incurs the same punishment 560</p> <p>9 By 25 Geo. 3. c. 67. to seduce any person employed in the iron and steel manufacture; or in the making of the tools and utensils incurs the same punishment f. 7</p> | <p>7 It is no battery for an officer to lay his hand gently upon the person he is about to arrest Page 264</p> <p>8 How a battery may be justified <i>ibid.</i> f. 3</p> <p>9 <i>Son assault demesne</i> may be taken advantage of on an indictment, as well as in an action; it may be given in evidence under not guilty in the first and must be pleaded, specially in the latter <i>ibid.</i></p> <p>10 How assaults and batteries are punished 264 f. 4</p> <p>11 Assaulting peers or members of parliament <i>ibid.</i> f. 3</p> <p>12 Assaulting clergymen <i>ibid.</i> f. 6</p> <p>13 Assaulting a master or mistress <i>ibid.</i> f. 7</p> <p>14 Assaulting a privy councillor. <i>ibid.</i> f. 8</p> <p>15 Assault for money won at play f. 9</p> <p>16 Assaulting in the streets with intent to spoil cloaths 265 f. 10</p> <p>17 To assault by shooting at another <i>ibid.</i> f. 11</p> <p>18 Assaulting with intent to rob <i>ibid.</i> f. 12</p> <p>19 Assaulting a master woolcomber, &c. <i>ibid.</i> f. 13</p> <p>20 To assault or threaten an adversary for suing him, or the attorney, counsel, or jurors in the cause, or a gaoler for detaining a prisoner is a contempt 90 f. 14</p> <p>21 A prisoner assaulting his gaoler may be lawfully killed by him in the affray 107 f. 13</p> <p>22 In a <i>bare assault</i> upon a house, if the owner fling out his money it is no burglary 160 f. 3</p> <p>23 But otherwise if upon the assault the door be opened and he enter the house 161</p> <p>24 To assault with intent to hinder the exportation of corn, &c. is a misdemeanour 243</p> |
|---|--|

A S S E R T I O N .

- 1 To assert that both or either house of parliament have a legislative authority without the king is *premunire* 86
Vide Speaking.

A S S A U L T and B A T T E R Y .

- | | |
|---|--|
| <p>1 An assault is an attempt, with violence, to do a corporal injury to another 263 c. 62</p> <p>2 As by striking at him; or pointing an offensive weapon; holding up a fist, &c. or any other act done in an angry manner <i>ibid.</i> f. 1</p> <p>3 But no words whatsoever can amount to an assault <i>ibid.</i></p> <p>4 An offender may be found guilty of the assault and acquitted of the battery <i>ibid.</i></p> <p>5 A battery is any injury actually done to the person of another; as spitting in his face; treading on his toes; jolting him in a revengeful manner <i>ibid.</i> f. 2</p> <p>6 Every battery includes an assault; therefore if the assault be ill laid and the battery good, it is sufficient <i>ibid.</i> f. 1</p> | <p>A S S E M B L Y.—<i>Vide Riot.</i></p> <p>1 An unlawful assembly is a disturbance of the peace by persons barely assembling 257
2 222</p> |
|---|--|

A TABLE OF PRINCIPAL MATTERS.

- 2 An assembly of a man's friends for the defence of his person, &c. is unlawful Page 297
- 3 But such an assembly in a man's house for the defence of it is lawful f. 10
- 4 How unlawful assemblies shall be suppressed, &c. f. 11

ASPORTAVIT,—*Vide Larceny.*

- 1 Is essential to every indictment for larceny 134 f. 2
- 2 What shall be said a sufficient *asportation* 135, (N) 139 f. 18

ASSIZE.—*Vide Bread.*

ASSURANCE.

- 1 To forge or counterfeit the common seal, &c. of the London or Royal Exchange Assurance Offices felony without clergy 209 f. 14
- 2 Destroying a ship to obtain the assurance is felony without clergy. 185

ATTAINER.

- 1 Anciently it *was thought* that any one might kill an *attainted* person 106 f. 8
- 2 But it is now determined to be murder 121 f. 15
- 3 An attainder in piracy corrupts not the blood 153 f. 7

ATTORNIES.

- 1 An attorney may prosecute or defend in the court where he is inrolled on a special retainer 542 f. 28
- 2 He may lay out his own money in the cause and maintain an action to recover it *ibid.*
- 3 How they may proceed in other courts *ibid.*
- 4 If any attorney be guilty of deceit, collusion or imposition he shall be disqualified and imprisoned 542 f. 29
- 5 As where he sues out an *habere fac.*

seisnam falsely reciting a recovery Page 543 f. 32

- 6 As where he brings a *precipe* against a poor man, who had no title, in order to get possession f. 33
- 7 Or if he appear and confess judgment without warrant f. 34
- 8 Or pleads a false plea to impose on the court f. 35

ATTEMPT to ROB.

- 1 By 7 Geo. 2. c. 21. whoever shall assault another by menace, or in a violent manner demand their property with an intent to rob shall be transported for seven years 148
- 2 How the offence must be laid and proved *ibid.* (N):

AVOIRDUPOIS WEIGHT.—*See Bread.*

AUDITA QUERELA

- 1 Conformity upon 1 Jac. 1. c. 4. is a good bar on an *audita querela* against an informer 30 f. 51

AUTHORS.

- 1 By 8 Ann. c. 19. authors or their assigns shall have the sole right of printing their works for fourteen years, &c. 476
- 2 A musical composition is within the act *ibid.* (N)
- 3 So an abridgment, or an index may be within it, but *quere* as to a chart *ibid.*
- 4 But every volume before publication must be entered in Stationer's Hall, in the manner described f. 25
- 5 And nine copies shall be left there for the universities, &c. f. 26
- 6 And after the expiration of the said fourteen years the right shall return to the authors, *if living*, for another fourteen years 477 f. 27
- 7 The case of literary property (N) 7
- 8 Mode

A TABLE OF PRINCIPAL MATTERS.

- 8 Mode of assigning the property so as to protect the contingent interest of authors *Page (N) 7*
- 9 By 8 Geo. 2. c. 13. the property of engravings is secured to their inventors for fourteen years *477 f. 28*
- 10 But the *name* of the proprietor, and *the day* of publication must be engraved on the plate *(N) 1*
- 11 By 17 Geo. 3. c. 57. proprietors of prints may bring an action on case, &c. for altering, adding to, or diminishing the prints *478*
- 12 By 15 Geo. 3. c. 53. the universities and colleges may print their own books, &c. at their own press *f. 29*

AVERMENT.—*Vide Indictment.*

B.

BACON and PORK

1. Imported may be seized. *P. 520 f. 108*
2. At what prices they may be exported. *f. 109*
- 3 May be exported although they do not exceed the prices mentioned. *f. 110*
- 4 How they may be exported to places in amity with the crown. *f. 111*
- 5 The duties to which they are subject. *f. 112 to 114*

B A I L.

- 1 A justice of the peace may either bail, or commit one who has dangerously wounded another, till the year and day be past; but he ought to be cautious if the wound be dangerous. *270*
- 2 A justice of the peace cannot bail in homicide *per infortunium* or *se defendendo*, but must commit till the assizes; but the offender may be brought up by *habeas corpus* and bailed. *114*
- 3 Anciently they might have been bailed by 12 men upon the writ *de odio et atia*. *f. 24*
- 4 Whoever is bail for another may take care to have his appearance recorded,

without being guilty of maintenance

Page 539 f. 19

- 5 By 21 Jac. 1. c. 26. to acknowledge, or procure to be acknowledged, any recognizance, bail, &c. in the name of any other person without their consent, is felony *178 f. 9*
- 6 In putting in bail before a judge, if a man *personate* another in one county, and the bail be filed in another, the trial shall be where the personating was committed *179*
- 7 The bare personating or acknowledging is no felony, but a misdemeanor, unless the bail be filed *ibid.*
- 8 Bail put in in *feigned names*, and no such *persons* exist, the offender cannot be prosecuted for *personating*; but he may be set in the pillory *179 (N) 1*
- 9 By 4 & 5 W. & M. c. 4. personating bail, before commissioners authorized to take bail in actions depending in the courts at Westminster, by which the person personated shall be made liable to pay, &c. is felony. *179 f. 11*

B A I L I F F.

- 1 Of a corporation is within 13 Car. 2. c. 1. must take the oaths. *15 f. 1*
- 2 By 5 Geo. 1. c. 4. he shall not be present at any other place of worship than in the church in his *official* habit, &c. *17 f. 5*
- 3 By 8 Hen. 6. c. 9. bailiffs of a franchise, not returning the king's writ upon forcible entry, shall forfeit *20 l.* *277 f. 11*

B A I L M E N T.

- 1 *Bailment* of goods to another for a special purpose, gives the *bailee* such a *possession* of them that he cannot be guilty of felony in stealing them while the *possession* continues *134 f. 3*
- 2 But if the *bailee* take away *part* of what is bailed to him, he may be guilty of felony, for his possession was of *the whole*, as one entire thing, and not of any distinct and separate part *135*
- 3 The *bailment* also must be fairly and honestly obtained; for, if it appears

A TABLE OF PRINCIPAL MATTERS.

- 8 No indictment good without the words *communis barrator* P 526 f. 9
- 9 But *contra formam statuti* will not vitiate an indictment for barratry, although the statute only goes to the punishment f. 10
- 10 It need not be charged to be done at any particular place f. 11
- 11 But it must conclude *contra pacem* f. 12
- 12 The parties must interchange a note of the particular matters to be given in evidence f. 13
- 13 The punishment of this offence f. 14
- 9 By St. West. 1. c. 29. if they *begin* the court or the party, they shall be *disbarred* and imprisoned, &c. Pages 62 f. 29
- 10 And counsellors not sworn are as much within this act as serjeants, &c. 530

BARON AND FEME.—*Vide Fm Couert.*

BASE MONEY.

1. If the king's ministers make money of baser alloy than they ought, they and their receivers and comforters are within the statute of treasons 62 f. 55
- 2 To utter base money knowingly is a high misprision at common law f. 56
- 3 By 8 and 9 W. 3. c. 26. whoever shall make base coin resemble the current money of England, or shall wash or colour, &c. any round blanks of base metal for that purpose, their aiders, &c. are guilty of high treason. 64
- 4 By 1 and 2 P. and M. c. 11. to import base foreign coin current here is high treason 65 f. 65
- 5 The person importing must know it to be false f. 66
- 6 If *base money* be found on a suspicious person he may be arrested 66 f. 68
Vide Coin.

BASTARD.

- 1 Shall take the oaths, &c. in open court, before they shall be admitted to the vocation 81 f. 27
- 2 By 7 Will. 3. c. 24. barristers practicing as such in any court whatsoever, without taking the oaths, &c. and subscribing the declaration incur a *premunire* 84 f. 43
- 3 By 13 Will. 3. c. 6. and 1 Geo. 1. c. 13. every person who shall act as barrister, &c. in any courts in England shall, within three months, &c. subscribe the oaths at Westminster, or at the general sessions of the peace where they reside, or they shall *ipso facto* be rendered incapable of the said office, and *on conviction*, shall be disabled to sue, &c. or to vote, &c. and forfeit 500 l. 97
- 4 By St. West. 2. c. 49. none of the king's council, &c. shall receive any freehold while the thing is in plea 546 f. 11
- 5 A barrister receiving part of land *for his wages*, after the suit is determined is not within 28 Edw. 1. c. 11. against champerty 548 f. 20
- 6 A barrister cannot justify indirect practices to influence a jury 549 f. 5
- 7 A counsel, *having received his fee*, may lawfully set forth his client's cause to the best advantage, but he cannot give him money to maintain his suit 542 f. 27
- 8 Barristers are liable to punishment for any deceitful practice f. 29
- 1 By 21 Jac. 1. c. 27. if a woman be delivered of a bastard child, and privately endeavour to conceal the death of it so as to prevent it being known whether it be born alive or not, except the mother can prove, by one witness, that such child was born dead she shall suffer as in case of murder 121 f. 17
- 2 No bastard children born in vagrancy, shall gain a settlement by birth, or be sent to the place where born for want of other settlement; but the settlement of the mother shall be the settlement of such child 576 f. 25

BATTERY.

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BATTERY.—*Vide Assault.*

- 1 Every battery includes an assault *P*263 f. 1
- 2 If the assault be ill laid the defendant may be found guilty of the battery *ibid.*
- 3 A battery is any injury, however small, done to *the person* of another f. 2
- 4 But one may justify *laying his hands gently on another* for a lawful purpose 264
- 5 How battery may be justified and punished f. 3, 4
- 6 Surety of the peace may be required for a threatened battery 254 f. 7

BAWDY HOUSE.

- 1 An insurrection to destroy *all* bawdy houses is high treason, from the *generality* of the intention. 54 f. 25
- 2 The offence of keeping a bawdy house is a common nuisance 357 c. 74
- 3 A *feme covert* is punishable with her husband for this offence, or without him, if he does not live with her 4 f. 12(N)11
- 4 A lodger who keeps only a single room for this purpose is indictable as the keeper of a bawdy house 357
- 5 This offence is liable to fine, imprisonment and such *infamous* punishment as the court shall think fit *ibid.*
- 6 But the bare solicitation of chastity is not indictable *ibid.*
- 7 A man may be bound to his good behaviour for haunting bawdy houses with women of bad fame. 261 f. 2
- 8 How offenders may be apprehended and prosecutions carried on 358 f. 5

BEACH.—*Vide Trees.*

BEARS.

- 1 Bears, or other things of a base nature, are not so regarded by the law, that a man should die for their sakes,

and therefore cannot be the subject of larceny. *Page* 143 f. 23

BEASTS.

- 1 The felonious taking of domestick beasts, as horses, mares, colts, &c. or any creatures *domita natura* as poultry, &c. may be the subject of larceny. 144 f. 28
- 2 But animals of a base nature as dogs, bears, foxes, &c. or any animals *fera natura* and unreclaimed, cannot be the subject of larceny. 143

BEER.—*Vide Ale. Brewer.*

BEHAVIOUR.

- 1 A justice of the peace may commit one guilty of a forcible entry if he refuse to give surety for his good behaviour 276
- 2 The author of an obscene writing may be bound to his good behaviour as a person of evil fame 355 f. 9.
- 3 By 34 Ed. 3. c. 1. justices of peace are required to take of all them that be not of good fame, sufficient surety for their good behaviour 261
- 4 But this means of such only as intend to break the peace f. 2
- 5 Or those who by quarrelsome behaviour give just suspicion of their readiness to break the peace *ibid.*
- 6 As for offences *contra bonos mores*, as frequenting bawdy houses, speaking contemptuously of a magistrate though not in the execution of his office; or of a constable or other inferior officer in the discharge of his duty *ibid.*
- 7 But this surety cannot be required for barely calling another names f. 3
- 8 This power in the magistrate is discretionary and he may take the surety of all whose behaviour involves them in the description of persons of *evil fame* 262 f. 4
- 9 But if he commit for want of surety he must shew the cause with convenient certainty. *ibid.*
- 10 Instances

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- 10 Instances in which this surety has been taken *Page 262 (N) 1*
 11 A recognizance for such surety may be forfeited by a commission of the offence intended to be prevented by it *f. 5.*
Vide Contempts, No. 16. 20.—Conspiracy, No. 20.

B E G G A R S.

- 1 Soldiers or sailors wandering as beggars without a testimonial from a justice shall be guilty of felony without clergy. *183 c. 48*
 2 Beggars pretending to be soldiers or sailors shall be deemed rogues and vagabonds *184 f. 6*
 3 All persons going about from door to door, or placing themselves in streets, highways, or passages, to beg or gather alms in the parishes or places where they dwell are to be deemed idle and disorderly persons *5*
 4 One justice may, on conviction by one witness, &c. &c. commit such offender to hard labour for a month. *ibid.*
 5 Any person may apprehend such beggars and carry them before a justice, if they resist or escape, they shall be punished as rogues and vagabonds *ib.*
 6 The justice may order the overseer of the parish to give the person apprehending such beggar a reward of 5 s. *Vide Vagrants, ibid.*

BELL METAL,—*Vide Stolen Goods.*

BENEFIT OF CLERGY. *Vide Felonies.*

B E N T.

- 1 By 15 and 16 Geo. 2. c. 33. whoever shall destroy bent on the sea coasts shall forfeit 20 s. *ibid.*

B I G A M Y.

- 1 By 1 Jac. 1. c. 11. if any married person, shall marry another person, the former husband or wife being alive, shall be guilty of felony *174*

- 2 The offenders may be tried in the county where they are apprehended but it is no felony *Page 174*
 3 If the husband or wife shall be continually remaining beyond the seas by the space of seven years together. *f. 2*
 4 Or shall be absent the one from the other for the space of seven years, within the kingdom, the one not knowing the other to be alive within that time. *ibid.*
 5 Or if either of them shall be divorced or the marriage declared void by the spiritual court at the time of the second marriage. *f. 3*
 6 Or if either of the parties are within the age of consent. *ibid.*
 7 But this offence shall not incur attainder, corruption of blood, loss of dower, or disherison *f. 4*
 8 A divorce, *a vinculo matrimonii*, and also *a mensa et thoro causa adulterii et fornicationis* is within the exception of this statute. *f. 5*
 9 Where one of the parties is within the age of consent, the other is thereby also exempted from the felony. *f. 6*
 10 If the first marriage be beyond sea, and the latter in England, the party may be indicted for it in England *f. 7*
 11 And *quere* if he may not though the first marriage be in England, and the second beyond sea *f. 8*
 12 The first and true wife is not an admissible evidence against her husband *175(N)1*
 13 She cannot even make an affidavit to postpone the trial. *ibid.*
 14 But the second woman is a competent witness. *ibid.*
 15 A second husband, without privity of the first marriage, is intitled to the profits of the woman's industry. *ibid.*
 16 The production of the sentence in a suit for jactitation does not preclude the proof of the marriage *(N)*
 17 If such a sentence were conclusive evidence against the fact of marriage, yet it may be impeached by fraud or collusion. *ibid.*

Vide Marriage.

BILLS

A TABLE OF PRINCIPAL MATTERS.

BILLS.—*Vide Forgery. Chafes in Action.*

- 1 By 2 Geo. 2. c. 25. it is felony without clergy to forge, or cause to be forged, or to assist in forging, any bill of exchange or promissory note for the payment of money, or any indorsement thereon. *Page 210 f. 16*
- 2 And by 7 Geo. 2. c. 22. to forge, &c. any acceptance, or number, or principal sum thereon. *241 f. 18*
- 3 So also by 31 Geo. 2. c. 10. to forge, &c. any bill to receive the monies due to any seaman, &c. *212 f. 21*
- 4 Or by 9 Geo. 3. c. 30. knowingly to utter the same. *ibid.*

BILLS OF MORTALITY.—*Vide page 233. Chairman. Cattle No. 8. 21. Bread.*

BILLINGSGATE.—*Vide Nuisances.*

B I R C H.—*Vide Trees.*

B I S H O P.—*Vide Præmunire. Pepery.*

1. Every bishop may convict for heresy within his own diocese, and proceed to punish by church censures. *6 f. 4*
- 2 But no other spiritual judge can. *ibid.*
- 3 By 24 Hen. 8. c. 9. the archbishop of either province may cite the offender, if the immediate ordinary consents, or if he neglects his duty. *f. 5*
- 4 By 11 and 12 Will. 3. c. 4. whoever shall convict a *popish bishop* of saying mass, shall receive 100 l. and the offender be condemned to perpetual imprisonment.—But this is repealed by 18 Geo. 3. c. 60. provided the offender shall have taken the oath therein prescribed before any prosecution commenced. *39 f. 2*

B I T C H.—*Vide Dog.*

BLACK ACT.

- 1 By 9 Geo. 1. c. 22. it is felony without clergy to appear, ARMED AND DISGUISED in any inclosed grounds where deer, hares, or conies are usually kept. *Page 187*
- 2 Or in any high road, open heath, common, or down. *187 f. 2*
- 3 Or to hunt, wound, destroy, or steal any fallow deer. *ibid.*
- 4 Or to rob any warren where hares or conies are usually kept. *ibid.*
- 5 Or to steal or take away any fish out of any river or pond. *222 f. 4*
- 6 It is also felony without clergy, whether armed and disguised or not to hunt, wound, destroy or steal any fallow deer in any of the king's inclosed parks or forests. (*Sed Vide 16 Geo. 3. c. 30. p. 189*) *187*
- 7 Or to break down the head of any fish-pond whereby the fish shall be lost or destroyed. *212 f. 4*
- 8 Or to kill, maim, or wound any cattle. *180 f. 2*
- 9 Or to cut down or destroy any trees planted in any avenue or growing in any garden, orchard, or plantation, for ornament, shelter or profit. *215 f. 4*
- 10 Or to set fire to any house, barn, out-house, or to any hovel, cock, mew, a stack of corn, straw, hay, or wood. *224 f. 4*
- 11 Or to maliciously shoot at any person in any dwelling-house or other place. *225*
- 12 Or to send any letter, without any name subscribed thereto, or signed with a fictitious name demanding money, venison, or other valuable thing. *226 f. 3*
- 13 Or to forcibly rescue any person, in custody for any of the above offences. *224 f. 4*
- 14 Or to procure, by gift or promise of reward, any person to join in committing any such unlawful act. *ibid.*
- 15 Any two justices may receive information on the oath and subscription of one witness, which they shall transmit to a secretary of state, who

A TABLE OF PRINCIPAL MATTERS.

is to lay the same before the king and council, where an order may be made for *the offender to surrender* himself, after proclamation at two market towns, at the time and in the manner directed by the act; and if he neglect to surrender he shall be deemed convicted of felony without clergy; and the king's bench or goal delivery, on production of the order of council, may award execution against the offender.

Page 187 f. 88

- 16 And whoever shall *abet* an offender after the time limited for his surrender is expired, shall, *on conviction*, be guilty of felony without clergy. 188 f. 4
 - 17 But the surrender clause shall not supersede the power of magistrates to apprehend the offender by the ordinary process of law. 185 f. 5
 - 18 But if he is apprehended by the ordinary process, it shall *avert* the consequences of the surrender clause, and the offender shall be tried by the common law.
 - 19 The hundred is made liable to the extent of 200*l.* for the offences mentioned, No. 8, 9, 10.
 - 20 But the persons injured must give notice to some of the inhabitants, within two days after the offence is committed and be examined within four days after, touching their knowledge of the offence.
 - 21 The action to be within one year; and if the offender be convicted within six months after the offence, the hundred is exonerated.
 - 22 Justices may issue their warrants to search for stolen venison.
 - 23 Persons wounded, or if killed, their executors, &c. are intitled to 50*l.* for apprehending and convicting an offender.
 - 24 This act to be openly read at the quarter sessions, &c.
- N. B. For the clauses not referred to the book for, vide the act.*

BLACK LEAD.

- 1 By 25 Geo. 2. c. 10. to enter a black lead mine by force, and take away

wad, cawke, or lead, &c. their aiders and abettors shall be transported for seven years, or whipped. P. 218 f. 12

BLASPHEMY.

- 1 All blasphemies against God, or contumelious reproaches of our Saviour, are offences at common law, punishable by the temporal judges with fine, imprisonment, and infamy. 10 f. 1
- Vide Religion.*

BLOOD.—*Vide Corruption of Blood.*

BLACK MAIL.

- 1 By 43 Eliz. c. 13. whoever inhabiting near the borders of Cumberland, Westmoreland or Durham, shall take any persons or goods and imprison them till ransom made, &c. &c. shall suffer death without clergy. 201

BLUDGEON.—*Vide Vagrant.*

- 1 By 23 Geo. 3. c. 88. a person apprehended with a bludgeon or other offensive weapon upon him, with intent feloniously to assault another, shall be deemed a rogue and vagabond. 148

B O A T S.

- 1 By 10 Geo. 2. c. 31. no person shall carry in a *tilt boat*, &c. more than 37 passengers and 3 by the way. Nor in any *other boat*, more than 8 passengers and two by the way. Nor on a Sunday more than 8 persons over the ferry. 569
- 2 And if any greater number shall be taken, and any passenger in a boat *so* *overcharged* shall be drowned, the navigator of the boat shall be transported as a felon. 51
- 3 No person shall use any boat or barge on a Sunday without the allowance of

A TABLE OF PRINCIPAL MATTERS.

of some justice of peace, on pain of
5 l. Page 11 f. 3

- 4 But 40 watermen may be appointed
by the Watermens Company to ferry
boats over the Thames on a Sunday.

*Vide 2 Geo. 3. c. 28. for thefts by bum
boats on the Thames.*

B O N D.—*Vide Usury, Extortion.*

- 1 Stealing an obligation is not within
21 Hen. 8. c. 7. 139 f. 14
- 2 Nor is the stealing a bond, felony by
the common law. f. 22
- 3 But by 2 Geo. 2. c. 25. the stealing
of bonds and certain other choses in
action, is made such felony as steal-
ing the property they secure would
be. 142
- 4 Those who have an equitable interest
in a bond, may maintain another for
the recovery of it. 539 f. 17
- 5 A bond is within 29 Eliz. c. 6. which
authorizes the king to take the goods
of a person absenting himself from
church on default of paying the 20 l.
a month. 22 f. 14
- 6 By 9 Ann. c. 27. to forge South Sea
bonds is felony without clergy.
208 f. 11
- 7 By 7 & 8 Will. 3. bonds given to pro-
cure the return of a member to parlia-
ment, are void; and the giver there-
of shall forfeit 300 l. 314 f. 8
- 8 A bond, by a deputy to pay a cer-
tain sum at all events, is bribery, and
void. 313
- 9 But not a bond to pay half the profits,
or a certain sum out of the profits of
the office for a deputation. f. 5
- 10 The obligee may raise out *libris* and
insert *marcis*, without being guilty of
forgery. 337 f. 4
- 11 By 2 Geo. 2. c. 25. to forge any
bond or writing obligatory is felony
without clergy. 210 f. 16
- 12 To make a bond for 500 l. seem to
be a bond for 5000 l. by adding ano-
ther cypher was forgery at common
law. 336 f. 2
- 13 But forging a bond containing a
mere gift of personal chatels is not
within 5 Eliz. 342 f. 21

B O N A.

- 1 *Bona capellæ* is a good description in
an indictment for stealing the goods
of a chapel; *bona domus et ecclesiæ*
for stealing the goods of an abbey;
bona parochianorum for stealing the
goods of a parish church. Page 144
*Vide goods and chattels. Indictment. Res-
titution.*

B O O K S.

- 1 By 3 Jac. 1. c. 5. no person shall
import, print, buy, or sell any Popish
books on penalty of 40 s. for every
book, and the books to be burnt. 46
f. 15
- 2 The 8 Ann. c. 19. made to encourage
the writing of useful books. 475 f. 24
- 3 The author of any book or his assigns,
shall have the exclusive copy-right for
14 years, to commence from the day
of publication; and whoever shall in-
vade that right shall forfeit all the im-
pressions and one penny for every
sheet found in his custody. 476
- 4 A musical composition is a book with-
in the meaning of this act. *ibid.* (N)
- 5 But the author may consent, by writ-
ing in the presence of two witnesses,
that another shall print such books.
ibid.
- 6 But this act shall not extend to any
book or books printed without such
consent, unless the title to the copy of
the whole of such books be registered
at Stationers hall. 476 f. 25
- 7 Directions how the same shall be re-
gistered, if the clerk of the company
refuse to register, he shall forfeit 20 l.
and the author, on publishing the
same in the gazette shall have the
same benefit as if the work had been
registered. *ibid.*
- 8 Nine copies of all books so registered
shall be left at Stationers-hall for the
use of the Universities, &c. f. 26
- 9 After the first 14 years the copy-right
shall return to the authors, if living,
for another 14 years. f. 27

A TABLE OF PRINCIPAL MATTERS.

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| <p>10 The case of literary property; and the mode of assigning copy-right so as to protect the contingent interest of authors. <i>Page 476 (N) 7</i></p> <p>11 By 15 Geo. 3. c. 53. the Universities of Great Britain; and Eaton, West minister, and Winchester, shall have <i>for ever</i> the exclusive right of printing <i>at their own press, their own books.</i> 478 f. 29</p> <p>12 But they may sell the copy-right in like manner as any author. <i>ibid.</i></p> <p>13 The king may grant the exclusive right of printing the scriptures and law books. 471 f. 6</p> | <p>5 The assize to be in avoirdupoise weight. <i>Page 491</i></p> <p>6 A return to be made weekly to the court of aldermen of London of the prices of grain, &c. in the London markets, to be entered in a book for the inspection of the bakers. f. 10</p> <p>7 And the assize shall be set the next day by the said court, if sitting; if not by the lord mayor. <i>ibid.</i></p> <p>8 The meal-weighers shall leave a copy of the returns at Bakers Hall. <i>ibid.</i></p> <p>9 The same power, &c. given to the court of aldermen of every other city, who shall cause the prices of grain, &c. to be returned and <i>within two days</i> shall set an assize to continue in force <i>for seven days.</i> 492</p> |
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BORDERERS.—*Vide Black Mail.*

- 1 For the offences of black mail. And of moss troops, &c. *Vide 200 to 202*

BRAWLING.—*Vide Affrays.*

- 1 A *feme covert* may be indicted as *communis rixatrix.* 5 (N) 11
- 2 By 5 and 6 Edw. 6. c. 4. whoever shall *brawl*, &c. in a church or churchyard, the ordinary, on proof by two witnesses may suspend a layman *ab ingressu ecclesie*, and a clerk from *ministration.* 271 f. 24
- 3 This is a distinct and substantive offence; in the punishment of which, the spiritual court shall not be prohibited except they proceed to damages. 272 (N)
- 4 Cathedrals and their burying places are within this statute. *ibid.*

B R E A D.

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| <p>1 In setting the assize, respect shall be had to the price of grain, &c. in the public markets. 486</p> <p>2 Where there is an assize, only wheat and household bread, or such bread as shall be allowed, shall be sold. 487</p> <p>3 The assize and price of bread shall be according to the tables. <i>ibid.</i> f. 7</p> <p>4 Explanation of the tables. 487 to 490</p> | <p>18 Forfeiture on every meal weigher who shall neglect his duty, and on every officer who shall disobey. f. 20</p> <p>19 Penalty for refusing to disclose the true price of grain, or for giving in a false price. f. 21</p> <p>20. If a false return or price shall be suspected, the magistrates may examine the party and fine him 10<i>l.</i> 495</p> <p>21. But the party summoned shall not be obliged to travel above five miles from his place of abode. <i>ibid.</i></p> <p style="text-align: right;">22 Bakers</p> |
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A TABLE OF PRINCIPAL MATTERS.

- 22 Bakers shall make the bread of such weight, goodness, and price as shall be directed on pain of 40s. *P. 495 f. 23*
- 23 Penalty for adulterating bread. *f. 24*
- 24 Penalty for adulterating corn. *f. 25*
- 25 Penalty where the bread shall be of a different mixture of corn than what it imports. *f. 26*
- 26 Penalty for making bread under weight. *f. 27*
- 27 Every loaf of wheaten bread to be marked W. and every loaf of household H. *497*
- 28 Bakers taking higher than the fixed price, or refusing to sell their bread forfeit between 10*l.* and 40*s.* *f. 29*
- 29 Bread inferior to wheaten not to be higher than household. *f. 30*
- 30 Any magistrate, or peace officer by warrant, may search the houses of bakers, for bread wanting weight, or adulterated, &c. or not truly marked, and seize the same. *f. 31*
- 31 How adulterated meal or flour, &c. may be searched for and seized. *f. 32*
- 32 The offender shall forfeit not exceeding 10*l.* nor less than 40*s.* *f. 33*
- 33 And the magistrate may cause the offender's name to be published. *f. 33*
- 34 Whoever shall oppose or hinder such search shall forfeit not exceeding 5*l.* nor less than 20*s.* *499 f. 34*
- 35 But no miller, mealman, or baker shall act as a magistrate under pain of 50*l.* *f. 35*
- 36 How masters may be recompensed who pay penalties for the default of their servants. *f. 36*
- 37 Offences may be heard and determined in a summary way, &c. *f. 37*
- 38 How the penalties shall be applied 500 *f. 38*
- 39 Magistrates authorized to summon witnesses, &c. *f. 39*
- 40 No *certiorari* to be allowed 501 *f. 40*
- 41 The manner in which persons aggrieved may appeal to the sessions. *ibid. f. 41*
- 42 If the conviction be within six days of the sessions, the party grieved may appeal to the subsequent session. *f. 42*
- 43 Limitation of actions. *f. 43, 47*
- 44 By 3 Geo. 3. c. 11. although no assize be set, no loaf such as assized and priced loaves are ordered to be by the tables, shall be made at the same time and in the same place. *Page 501 f. 48*
- 45 But these sessions may order the sort of bread which shall be made. *f. 49*
- 46 The sorts of assized wheaten bread *f. 50*
- 47 Proportion as to weight between the white and wheaten bread and the wheaten and household assize bread. *f. 51*
- 48 The price of the peck loaf, and half peck, and other subdivisions in the wheaten and in the household bread. *f. 52*
- 49 Every peck loaf shall weigh 17 lb. 6 oz. every half peck 8 lb. 11 oz. every quarter peck, 4 lb. 5 oz. every half quarter peck 2 lb. 2½ oz. *f. 53*
- 50 And offenders shall forfeit not exceeding 5*s.* nor less than 1*s.* for every ounce wanting, and for less than one ounce not exceeding 2*s.* 6*d.* nor less than 6*d.* *505*
- 51 But such deficient bread must in the bills of mortality be weighed within 24 hours before some justice, and elsewhere within three days. *ibid.*
- 52 No wheaten bread of a higher price than household bread to be sold on pain of 20*s.* *f. 54*
- 53 To be marked as before. *Vide f. 55 No. 27.* *f. 55*
- 54 Bread made of any other grain than wheat to be impressed with such letters as the justice shall order, &c. *f. 56*
- 55 Justices or peace officers may search, &c. *Vide No. 30, 43.* *f. 57, 63*
- 56 By 13 Geo. 3. c. 62. A STANDARD WHEATEN BREAD shall be made. *507 f. 64*
- 57 Which shall not be sold as *prized* loaves together with *assized* loaves. *508*
- 58 The *assize* table for such bread. *509*
- 59 The price table for the same. *510*
- 60 Which shall be regulated by the laws before mentioned. *f. 68, 76*

A TABLE OF PRINCIPAL MATTERS.

BREACH of the PEACE.

- 1 Seditious words, against religion, are indictable, *as tending* to a breach of the peace. *Page* 110 f. 6
- 2 In what cases such homicide, as happens in the execution of an unlawful action where the principal design was a breach of the peace, shall be construed murder. 127 f. 46, 49
- 3 An *ineffectual* attack upon another for the purpose of robbing him, is punishable by fine and imprisonment as a breach of the peace. (*Vide* attempt to rob) 147. f. 3
- 4 A libel only *tends* to a breach of the peace.

BREACH of TRUST.

- 1 A mere breach of trust is no felony by the common law. 134. c. 33
- 2 By 3 and 4 W. & M. c. 9. whoever shall steal any of the furniture *let and intrusted* to him with any lodgings shall be guilty of felony 137 f. 10
- 3 By 21 Hen. 8. c. 7. servants, above eighteen years of age, and not apprentices, who shall go away with jewels, &c. delivered to them by their masters or mistresses to keep to the intent to steal the same, contrary to the trust and confidence reposed in them; or shall, being in the service of their masters, embezzle the same without assent, &c. to the amount of 40s. are guilty of felony. (Clergy ousted by 12 Ann. c. 7.) 138 f. 11
- 4 The offender must have been a servant to the owner of the goods both at the time they were delivered and at the time they were stolen f. 12
- 5 The goods must be delivered to keep; therefore if the servant receive money on his master's account and go away with it, he is not within the act; but otherwise if he receive the goods from another servant, &c. f. 13
- 6 Neither a wasting or consuming of goods, nor a *chese en action* are within the act. f. 14

- 7 The goods must be the property of the master at the time; but cloaths &c. delivered to the servant no way changes the property. *Page* 138 f. 15
- 8 By 7 Jac. 1. c. 7. manufacturers in woollens embezzling the wool or yarn delivered to them to manufacture shall be whipped, &c. f. 16
- 9 By 15 Geo. 2. c. 13. servants of the BANK embezzling the property they are entrusted with, are guilty of felony without clergy. 139, 140
- 10 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. servants of the post-office embezzling any letter containing a security for the payment of money; or stealing the same out of any letter that shall come to *his possession* shall suffer death without clergy. 140
- 11 A case upon an indictment on this act. *ibid.* (N) 4
- 12 By 17 Geo. 3. c. 56. servants in a variety of manufactures, are punished as the acts direct, for purloining the property entrusted to them by their employers. 140

BREAKING.—*Vide Burglary. Fowls Entry.*

B R E W E R S.

- 1 No brewer shall conspire to raise the price of victuals. 481 f. 10
- 2 No brewer shall use any molasses, course sugar, or any extract or composition thereof, in the making beer, &c. 512 f. 77
- 3 Or receive into his custody any quantity of the said materials exceeding 10 l. on penalty of 100 l. f. 78
- 4 Nor shall he use any broom, wormwood, or other bitter, instead of hops, on pain of 20 l. f. 79
- 5 Nor any sugar, honey, foreign grains, Guinea pepper, essential bane, coculus Indicus, &c. on pain of 20 l. f. 80
- 6 By 2 Geo. 3. c. 14. no brewer, &c. shall be sued for advancing the price of beer in a reasonable degree, and if he shall mix any small beer or worse with

A TABLE OF PRINCIPAL MATTERS.

with small, he shall forfeit 50*l.* Page
481, 482

BRIDGES.

- 1 What particular bridges it is made felony to destroy. 193*f.* 9
- 2 None shall make bridges except by custom. 443
- 3 Persons bound to repair them must make them of sufficient height and strength according to the course of the water. *f.* 1
- 4 No one shall be deemed guilty of trespass for entering lands or laying down materials on the grounds of another, for such purpose. *ibid.*
- 5 The repair of bridges lies upon the county unless such part as is within a franchise, if there be no special tenures or prescriptions to the contrary. *ibid.*
- 6 A corporation or other person may be liable either by tenure or prescription. *f.* 2
- 7 But a man is not bound to repair a new bridge built by himself for the common good. *ibid.*
- 8 But a tenant at will of a house adjoining a bridge is bound to repair his house in respect of his possession. (N) 1
- 9 And if a particular district bound to repair one kind of bridge, build another kind, of more general utility, the county shall repair it. 444 (N) 2
- 10 Any individual who is liable to repair a bridge may be made a defendant for not repairing, and shall pay such fine as shall be assessed; but he may have a remedy over against those who are equally liable for their contribution. *f.* 3
- 11 A plea that the defendant is not bound to repair is bad, unless it shew who is so bound. *f.* 4
- 12 If the defendant traverse the charge of repair, the attorney general may take a traverse upon the traverse and *sumise* that the defendants are bound to repair, but no inhabitant shall be upon the jury. *f.* 5, 6

- 13 The indictment must alledge the kind of bridge and if the obligation arises from *tenure*, it must state where the lands lie. Page 444 (N)
- 14 By 22 Hen. 8. c. 5. the sessions are empowered to inquire, hear and determine annoyances of broken bridges in the highways and to order their repair. 445 *f.* 7.
- 15 Where it cannot be known who are bound to repair, bridges without a city or town corporate shall be repaired by the county; if within, then by the city or town; and if the bridge shall be part in city or county and part in another, each shall repair the part accordingly. *f.* 8
- 16 The mode in which assessments shall be made and levied for the repair of bridges. The manner in which the justice may issue process, &c. 446, 447
- 17 Justices may allow the collectors reasonable charges. 448 *f.* 12
- 18 How the highways at the ends of bridges, within the space of 300 feet shall be kept in repair. *f.* 13
- 19 No private bridges are within the purview of the above act. *f.* 14
- 20 How far the power of the justices extends under this act. *f.* 15
- 21 Who shall be considered as inhabitants within the words of the act. 449 *f.* 16
- 22 The assessment to be made distinctly on each inhabitant. *f.* 17
- 23 From which no inhabitant can claim any exemption not even by charter or act of parliament. *f.* 18
- 24 It is questionable whether a burough which hath no bridge be not liable to contribute to the repair of the county bridges. *f.* 19
- 25 By 1 Ann. c. 18. the sessions upon any decayed bridge being presented, may levy a tax for the repair. *f.* 20
- 26 All questions concerning the repair of bridges shall be determined in the county where they lie. 405
- 27 Except the right of repair either to private persons or parishes, shall come in question. *ibid.*

A TABLE OF PRINCIPAL MATTERS.

- 28 But a *certiorari* lies upon an order of justices concerning a *private bridge*.
Page 450 (N) 2
- 29 And the act of Queen Ann extends only to bridges which the county is bound to repair. *ibid.*
- 30 The 12 Geo. 2. c. 29. authorizes the levying of the county rate, and orders that the repairs of bridges shall be paid therefrom. f. 21
- 31 But no part of the money shall be applied to the repair of bridges, until presentment by the grand jury at the assizes or sessions. *ibid.*
- 12 By 7 and 8 Will. 3. c. 7. all securities to procure a seat in parliament is void; and the giving of such a bribe incurs a penalty of 300l. Page 314 f. 8
- 13 But if the election is void, no action lies for this penalty. f. 8 (N) 1
- 14 By 2 Geo. 2. c. 24. Candidates or voters, giving or receiving a bribe for a vote at elections forfeit 500l. &c. f. 9
- 15 But if the offender, within twelve months, discover another offender so as he be convicted, the discoverer not having himself been previously convicted, he is indemnified, but no prosecution shall be after two years. *ib.* f. 10

B R I B E R Y.

- 1 Definition of this offence at common law 311 c. 67.
- 2 By 12 Rich. 2. c. 2. the great officers of state shall be sworn not to appoint any of the king's officers for reward. 312
- 3 By 4 Hen. 4. c. 5. no sheriff shall let his bailiwick to farm. 313
- 4 By 5 and 6 Edw. 6. c. 16. whoever shall procure an office by bribery shall be disabled to hold, &c. 313
- 5 No office in fee is within this act; but the office of chancellor, register, or commissary of the ecclesiastical courts, are *ibid.*
- 6 No person once disabled can be again restored by any grant or dispensation. *ibid.* f. 5
- 7 A colourable bond by a deputy of an office is void; but a bond to pay half the profits, or a sum certain for a deputation is good. *ibid.*
- 8 The above statute does not extend to the plantations. *ibid.*
- 9 Anciently, bribery in a judge was punished as treason; and now all bribery is liable to deprivation, fine and imprisonment. 314
- 10 The Earl of Middlesex fined 5000l. for bribery. f. 7
- 11 An attempt to influence another by means of a bribe is highly criminal; and offering money to a privy councillor for an office is punishable by information. *ibid.* (N)
- 16 This statute does not take away the common law process by indictment or information. *ibid.* (N) 4
- 17 But the court will not grant information except on special grounds till after the two years are expired. *ibid.*
- 18 And perhaps they will remit sentence on an indictment upon a recognizance to appear at the end of the two years. *ibid.*
- 19 But after that time they will not suspend the sentence because one of the witnesses is indicted for perjury. *ibid.*
- 20 Nor on affidavits that the offender was a discoverer. *ibid.*
- 21 Nor will they grant new trial because a witness was a party in the offence. *ibid.*
- 22 But they will, in order to ascertain who was the discoverer. *ibid.*
- 23 Having obtained a verdict is not conclusive proof of being a discoverer. *ibid.*
- 24 For a person, who makes an affidavit, on which another obtains a verdict, may be the true discoverer. *ibid.*
- 25 A verdict, only when completed by a judgment is a conviction, and the court will grant leave to complete it, and it will then relate back to the original discovery. *ibid.*
- 26 A colourable note or laying a wager is bribery within the act, although the

A TABLE OF PRINCIPAL MATTERS.

- the receiver voted for the opposite party. *Page 314 f. 10*
- 27 The bribery precludes the candidate from denying the right of the elector to vote. *ibid.*
- 28 A man may be guilty although he has not *then* declared himself a candidate. *ibid.*
- 29 It is not necessary that the party bribed should be in fact an elector. *ibid.*
- 30 The declaration for the penalty must state the sort of bribe that was given or received, and not alledge generally "that he took a gift or reward". *316 (N)*
- 31 This defect not helped by verdict. *ibid.*

B U B B L E S.

- 1 To project any scheme by public subscription, to the prejudice of national trade, &c. similar to the South Sea project, incurs a *præmunire* by 6 Geo. 1. c. 18. *86 (N) 10*
- 2 And also punished as a common nuisance. *364*

BUILDING.—*Vide Freehold. Dwelling House. Looms.*

B U L L I O N

- 1 Is the ore of gold, but it signifies, in general, either gold or silver in the mass. *70 (N) 1*
- 2 The king is intitled to all mines in which it is found. *ibid.*
- 3 Debasing bullion provided against by ancient statutes. *f. 1*
- 4 By 6 & 7 Will. 3. c. 17. none shall cast ingots of silver, in imitation of Spanish bars, on pain of 500l. *72 f. 7*
- 5 None shall export any molten silver, without being marked at Goldsmiths Hall, and a certificate from one of the wardens, that oath had been made by the owner, and one witness, that the same was lawful silver, &c. *ibid.*
- 6 All silver shipped without such mark and certificate may be seized. *73 f. 8*

- 7 No broker, not a goldsmith or refiner, shall buy or sell any molten silver on pain of six months imprisonment. *Page 73 f. 9*
- 8 All bullion to be entered out in the name of the owner, who shall prove whether it be English or foreign. *f. 10*
- 9 By 7 & 8 Will. 3. c. 19. no bullion shall be shipped except certificate shall be obtained from the Mayor and Aldermen of London, on oath of the owner and *two witnesses*, that the same is foreign bullion, &c. *ibid. f. 11*
- 10 The certificate to be *circumstantially* certified to the commissioners of customs, before any *cocket* shall be granted. *ibid.*
- 11 On default the owner shall forfeit the bullion, and double value. The captain of the ship 200l. &c. The cocket officer 200l. and loss of office. *ibid.*

Vide Coin. Multiplication,

B U L L S.

- 1 By 13 Eliz. c. 2. whoever shall put in use any Popish bull or instrument of absolution, shall be guilty of high treason. *67 f. 75*
- 2 Accessories after shall be guilty of *præmunire*. *ibid.*
- 3 Whoever does not disclose the offer of such *bulls*, within six weeks, are guilty of misprision of treason. *ibid.*
- 4 By a variety of statutes, the making use of Papal bulls is a *præmunire*. *78 f. 12, 14*
- 5 It is in the election of the crown to proceed against the offender, either for the *præmunire* or high treason. *f. 13*

BULLOCK.—*Vide Cattle.*

- 1 By 14 Geo. c. 6. and 15 Geo. 2. c. 34. whoever shall steal, &c. or kill, with intent to steal, any bullock, &c. &c. shall suffer death without clergy. —(N. B. A reward of 101.) *180 f. 3*

BURGLARY.

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BURGLARY.

- 1 Is a felony at common law, in breaking and entering the *manſion houſe* of another in the night *with intent* to commit felony. Page 159. c. 38
- 2 The word *noſtenter*, which is abſolutely neceſſary in every indictment for burglary, is ſatisfied by the degree of darkneſs which may prevent the offender's face from being known. 160. f. 2
- 3 There muſt be both an actual breaking, and an entry to complete this offence; for it muſt be laid *fregit et intravit*, which will not be ſatisfied, except in ſome ſpecial caſes, by the notional breaking implied by law in every treſpaſs. f. 3
- 4 Therefore, if a houſe be aſſaulted, and the owner fling out his money, it is no burglary. ibid.
- 5 What breaking is ſufficient. f. 4
- 6 It muſt be more than that which is ſuppoſed in a common treſpaſs. ibid.
- 7 An entrance by an open door, or through a hole, or open window, is not a burglary. ibid.
- 8 But if the thief had opened the door, or the window, or made the hole, or had been in the houſe by the owner's conſent and had unlatched a door therein, or had gone down a chimney, it is burglary. ibid.
- 9 Or if he had aſſaulted the houſe, with intent to rob, and the owner had opened the door, and, thereupon, he had entered, it is burglary. 161
- 10 So, where divers intending to rob a houſe, knock at the door and by that means obtain entrance. f. 5
- 11 So alſo, with the ſame intent, to take lodgings and then to fall upon the landlord. ibid.
- 12 Or under pretence of ſearching for felons to obtain entrance by authority of a conſtable. ibid.
- 13 By 12 Ann. c. 7. to enter a houſe by night or day with a felonious intent without breaking it and to *break out of it in the night*, is burglary. ib. f. 6
- 14 What entry is ſufficient. f. 7
- 15 The leaſt entry with any part of the body, as a foot over the threshold, or with an instrument, weapon, or a hand, or hook, or a piſtol within a window, or to turn the key of a door, or to lift up a latch, are ſufficient entrances to ſatisfy the word *intravit*. Page 161, 162
- 16 But the thing with which the entry is made, muſt be introduced for the purpoſe of committing the felony; and therefore where a center bit was uſed for *breaking* through a door which it had actually perforated, yet as it did not appear that any hand or instrument had *entered* for the purpoſe of committing the felony it was *held* inſufficient. 162 (N) 1
- 17 Thoſe who watch on the outside while others enter, are equally guilty though they never enter at all. ibid. f. 8.
- 18 So if a ſervant who is in the houſe open the door *feloniouſly*, for the thief to enter, both of them are guilty of burglary. f. 9 and (N)
- 19 In what place burglary may be committed. f. 10
- 20 Burglary may be committed by breaking, &c. houſes, churches, or the gates of a walled town; and in houſes, the word *manſionalis* is indiſpenſibly neceſſary. ibid.
- 21 A houſe wherein a man only dwells for part of the year; or which he has actually hired, but not moved into; or a chamber in an inn of court, or a houſe hired by a man's wife for her ſeparate reſidence without his knowledge, for it is the huſband's houſe; are all of them ſufficient to ſatisfy the words *domus manſionalis*. 163
- 22 And all out-buildings adjoining to the houſe or within the curtilage, are included. Vide Garland's Caſe. f. 12
- 23 The indictment muſt lay it to be the houſe of the leſſee or firſt tenant, and not of any of the inmates, except they have the intire poſſeſſion. f. 13
- 24 But a chamber in an inn of court is the houſe of the inmate, becauſe there, Chambers are all as ſeveral houſes, &c. ibid.
- 25 The author contends for a different doctrine, and that it may be laid and

A TABLE OF PRINCIPAL MATTERS.

- house of the lodger, *sed quere*, if the owner dwell therein. *Page 163, f. 64*
- 26 If the lodging be actually divided from the rest of the house, and have a separate door, it is certainly the house of the lodger. *f. 15*
- 27 Even though there are other inmates, or though the landlord occupy a cellar under the same roof, if he does not sleep in the house. *ibid. (N) 4*
- 28 But if a place be taken only as a work-shop, and no one sleeps therein, it is not a mansion. *f. 16*
- 29 Therefore to break into the plate glass manufactories, is transportation by 13 Geo. 3. c. 38. *ibid.*
- 30 No burglary can be committed by breaking ground inclosed, or a booth or tent. *f. 17*
- 31 The indictment must state, and the verdict find *an intention* to commit felony. *f. 18*
- 32 For if the intent was trespass only, it is no burglary. *ibid.*
- 33 But where the felony intended, is made so by statute, that is sufficient. *ibid.*
- 34 By 10 Geo. 3. c. 48. to receive jewels, &c. obtained by burglary, is transportation, &c. 165 f. 19 235 f. 9
- 35 By 23 Geo. 3. c. 88. to be found with implements for house-breaking is a misdemeanor. *f. 20*
- 36 A man's house is considered as his castle; he may kill an assailant with impunity. *(N)*
- 37 The manner in which burglary partakes of the nature of treason. *ibid.*
- 38 Clergy is taken away in burglary from principals by 18 Eliz. c. 7. and from accessaries before the fact, by 3 & 4 Will. & M. c. 9.
- 39 Whoever shall apprehend a burglar is exempted by 10 & 11 Will. 3. c. 23. from parish and ward offices, and the 5 Ann. c. 31. has superadded a reward of forty pounds—and an accomplice who shall convict two offenders is intitled to a pardon. *ibid.*

B U R I A L.

1. By 3 Jac. 1. c. 5. if any Popish recusant, shall be buried otherwise than according to the laws of this realm,

his representatives, or the person causing such burial shall forfeit 20*l*.

BURNING.—*Vide Arson. Page 66.*

- 1 To burn the house of which another *is in possession* is arson. 165 c. 39
- 2 By 43 Eliz. c. 13. any corn or grain in the four Northern counties is felony without. 223 f. 2
- 3 By 22 and 23 Car. 2. c. 7. any corn, grain or hay, &c. transportation. 224
- 4 By 37 Hen. 8. c. 6. any wain or cart loaded with coals, &c. 223
- 5 By 4 and 5 W. and M. c. 23. any covert for the red and black game, whipping and hard labour. f. 2
- 6 By 28 Geo. 2. c. 19. any covert for deer and game, &c. shall forfeit from 40*l*. to 5*l*. *ibid.*
- 7 By 1 Geo. 1. c. 48. any wood, under-wood, or coppice, &c. is felony. 224, f. 3
- 8 By 9 Geo. 1. c. 22. any house, barn, or out-house, &c. is felony without clergy. f. 4
- 9 By 10 Geo. 2. c. 32. any coal mine is death without clergy. f. 5
- 10 By 9 Geo. 3. c. 29. any wind, water, or other mill, is felony without clergy. f. 6
- 11 By 6 Geo. 1. c. 23. assaulting with intention to burn the garments of another, in the public street is transportation. 238
- 12 By 22 & 23 Car. 2. c. 11. & 1 Ann. c. 9. to burn any ship to the prejudice of the owners, or freighters. 4 Geo. 1. c. 12. to the prejudice of the underwriters, felony without clergy. 185 f. 10, 11
- 13 By 12 Geo. 3. c. 24. to burn the king's ships of war, or any of the arsenals, or the stores, &c. therein, felony without clergy. 75 f. 19
- 14 By 6 Ann. c. 31. servants burning, *by negligence*, any dwelling-house, &c. forfeit 100*l*. 197 c. 53
- 15 By 27 Geo. 2. c. 15. threatening by anonymous or fictitious letters, to burn houses, barns, &c. is felony without clergy. (226 c. 4

BUSHES.

A TABLE OF PRINCIPAL MATTERS.

BUSHES.—*Vide Highways.*

- 1 By 13 Ed. 1. no bush, &c. whereby a man may lurk to do hurt, shall stand within 200 feet of either side of a highway leading from town to town. But this shall not extend to ashes or great trees. *Page 382 f. 26*
- 2 And if any felony be done by not removing such bushes, the lord shall answer. *ibid.*
- 3 By 13 Geo. 3. c. 78. no bush, &c. shall grow within 15 feet from the center of any highway, except for shelter, ornament, or profit. 407 f. 59

BUTCHER.

- 1 Shall sell meat by the pound. 481 (N)
- 2 Or by weight, or otherwise. *ibid.*
- 3 Butchers shall not conspire not to do their work but at a certain rate, or not to finish what they have begun. f. 10
- 4 Cannot sell meat on a Sunday. 11 (N)
- 5 But this is no offence at common law, and therefore the indictment must conclude *contra formam statuti*, viz. 3 Car. 1. c. 1. *ibid.*
- 6 The usual method is to indict for the nuisance. *ibid.*

BUTTER and CHEESE.

- 1 Every kilderkin of butter shall contain 112 lb. every firkin 56 lb. and every patt 14 lb. reckoning 16 ounces to the lb. 514
- 2 No old and new butter shall be mixed, nor whey butter packed with cream, butter, &c. &c. *ibid.*
- 3 No butter for sale shall be repacked. f. 86
- 4 The manner in which the package shall be marked, &c. *ibid.*
- 5 How the factor or buyer shall make the packages. f. 87
- 6 Warehouse-keepers shall ship all butter and cheese that shall be directed to their care, to the London market, without preference. 515

BUTLER.

- 1 A butler, &c. who has the *bare charge*, or the *special use* of his master's goods, may be guilty of felony in taking them away. *Page 136 f. 6*

BUYING and RECEIVING.—*Vide stolen goods.*

BUYING TITLES.—*Vide pretended Titles.*

C.

CABBAGES.

- 1 By 13 Geo. 3. c. 32. to steal or destroy cabbages, &c. in a garden, incurs a penalty of 10*l.* 217. f. 11

CALENDAR.

- 1 By 3 Hen. 7. Gaolers must certify their prisoners to the gaol delivery to be calendared. 194 (N)

CALLICO.—*Vide Cotton.*

CANONICAL OBEDIENCE.—*Canonical Purgation.*

- 1 By 2 Hen. 4. c. 1. to purchase from the Pope an exemption from canonical obedience, incurs *præmunire*. 79
- 2 Canonical obedience results to the metropolitan, both from institution and ordination. 133. f. 7

CANUTUS.—*Vide Englishbire.*

CAPACITY of GUILT.—*Vide Crimes. Age. Infancy.*

A TABLE OF PRINCIPAL MATTERS.

C A P I A S.

- 1 By 14 Geo. 3. c. 86. a *capias* may issue against any person prosecuted for smuggling. Page 227

CAPIATUR.—*Vide Writ. Procefs.*

CAPITAL OFFENCES.—*Vide Felonies without Clergy.*

C A P T A I N.

- 1 If any captain, &c. shall wilfully cast away, burn or otherways destroy his ship, to the prejudice of the owners, the freighters, or the underwriters, he shall suffer death without clergy. 185. f. 10, 11
- 2 A captain or other officer in the East India company's service cannot resign his commission at all times and under any circumstances. *ibid.* (N)
- 3 By 29 Geo. 2. c. 17. English captains or other officers entering into the service of the French king are guilty of felony without clergy. *ibid.*
- 4 The punishment of captains who shall carry bullion unlawfully. 73. f. 11
- 5 Burning his ship to defraud the underwriters is not piracy. 155. (N)
- 6 What acts of a captain amount to piracy. f. 14
- 7 The penalty on the captain for the unlawful transportation of wool. 195

C A P T I O N.

- 1 The caption of an indictment on the statutes of forcible entry need not shew that the justices had authority to hear and determine felonies and trespasses. 283. f. 36

C A R D S.—*Vide Dice.*

- 1 The king's grant for the sole making, importing and selling, of playing cards is void. 471. f. 5

- 2 The playing with them is, in itself, lawful and innocent. Page 471

CARRIAGES.—*Vide Purveyors. No. Highways. Turnpike Roads.*

C A R R I E R S.

- 1 A carrier who receives goods to carry to a certain place, cannot be said to steal them by embezzling them afterwards. 134. f. 3
- 2 But if a carrier open a package and take out part of the goods, with *intention* to steal, he is guilty of felony; for he had no possession of such *part* distinct from the whole. 135. f. 5
- 3 No carrier shall travel on a Sunday. 11, 12

C A R N A L.

- 1 All unnatural carnal copulations with man or beast come under the notion of sodomy. 9. c. 4
- 2 The carnal knowledge of a woman, by force, and against her will constitutes a rape. 169. c. 41
- 3 By 18 Eliz. c. 7. f. 4. if any person shall carnally know and abuse any woman child under the age of ten years, he shall suffer as a felon without clergy. 170
- 4 By the same statute *rape* is also excluded. *ibid.*

CARNALITER COGNOVIT.

- 1 Are necessary in every indictment of rape. 9. f. 2

C A R R O T S.

- 1 By 13 Geo. 3. c. 32. to steal or destroy any carrots, &c. in a garden or land inclosed, on conviction in 30 days in a summary way forfeits 10s. 217. f. 11.

CASTRATION.

A TABLE OF PRINCIPAL MATTERS.

CASTRATION.—*Vide Maim.*

- 1 Was anciently punished with death.
Page 175. f. 3

CASUALTY.

- 1 If casual death happens from the prosecution of a *lawful* act, the party is guiltless. 5 (N)

CASUAL DEATH.—*Vide Deodand.*

- 1 Whatever thing *moves* toward' the casual death of any person is forfeited as a deodand. 100. c. 26

CASTIGATORY.—*Vide Scold. Cucking Stool.*

CATTLE.—*Vide Slaughter House.*

- 1 By 22 & 23 Car. 2. c. 7. to destroy horses, sheep, or other cattle, in the night, is death or transportation, in the option of the offender, and may be tried by a jury before three justices of the peace. 179 c. 46
- 2 By 9 Geo. 1. c. 22. whoever shall kill, maim, or wound, any cattle, shall be guilty of felony without clergy. 180
- 3 A mare or stone colt is within the meaning of the word *cattle*. *ibid.* (N)
- 4 By 27 Eliz. c. 13. the hundred is liable to the amount of 200l. *ibid.* f. 2
- 5 By 14 Geo. 2. c. 6. and 15 Geo. 2. c. 34. whoever shall steal, or kill with that intent, one or more sheep, bull, cow, ox, steer, bullock, heifer, calf, or lamb, but no other cattle whatsoever, shall be deprived of the benefit of clergy. *ibid.* f. 3
- 6 The word *beifer* in this act is used in contradistinction to the word *cow*; therefore evidence of the one will not support an indictment for stealing the other. *ibid.* (N) 2
- 7 By 37 Hen. 8. c. 6. whoever shall cut out the tongue of any tame beast,

or of any person, they being alive, shall pay treble damages, and forfeit ten pounds. Page 180 f. 4

- 8 No salesman within the bills of mortality, shall buy or sell cattle on his own account, or on the road coming to market. 515 f. 89
- 9 How such offenders shall be punished. 90

- 10 By 9 Geo. 3. c. 39. the crown may prevent importation of cattle upon suspicion of the contagion. 180

- 11 By 21 Geo. 3. c. 67. the driving of cattle within the bills of mortality is regulated. *ibid.*

- 12 By 26 Geo. 3. 71. slaughtering cattle without licence or notice, &c. is felony. 180

CENSOR.

- 1 It is questioned (1 *Carth.* 478.) whether the censor of the college of physicians is within the meaning of the the test act, 25 Car. 2. c. 2. 17 f. 4

CEPIT.

- 1 What will satisfy the word *Cepit* in an indictment of robbery. 147

CERTIFICATE.

- 1 Of the oath required by 1 Eliz. c. 1. f. 19. made to the King's Bench, is sufficient; in which an ecclesiastic need not be stiled *clericus*; and the bringing of it need not be said *per mandatum episcopi*. *Sed quere* If this statute as to the oath is not repealed by 1 Will. and Mary, c. 8. 81. f. 27. 82. f. 33, 34, 35

CERTIORARI.

- 1 A *certiorari* from the King's Bench, is a supersedeas to restitution in a forcible entry. 292. f. 62
- 2 By 1 Ann. c. 18. concerning the repair of bridges no *certiorari* shall be allowed. 450
- 3 Nor

A TABLE OF PRINCIPAL MATTERS.

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| <p>3 Nor by 8 Geo. 2. c. 20. for punishing destroyers of turnpikes. <i>P.</i> 193 f. 7</p> <p>4 Nor by 12 Geo. 2. c. 29. for assessing county rates. 450 f. 21</p> <p>5 Nor on 19 Geo. 2. c. 21. against cursing and swearing. 12 f. 4</p> <p>6 Nor on 23 Geo. 2. c. 13. against seducing artificers. 559 f. 4</p> <p>7 Nor on 25 Geo. 2. c. 36. against bawdy houses. 357 f. 2</p> <p>8 Nor on 29 Geo. 2. c. 40. against stealing lead, iron, &c. 232 f. 2</p> <p>9 Nor on 30 Geo. 2. c. 21. for preserving fish in the Thames. 519</p> <p>10 Nor on 30 Geo. 2. c. 24. for restraining gaming in public houses. 469</p> <p>11 Nor on 31 Geo. 2. c. 29. for the regulation of bread. 486</p> <p>12 Nor on 2 Geo. 3. c. 30. for preventing thefts in bumb-boats.</p> <p>13 Nor on 10 Geo. 3. c. 18. against dog stealers. 143</p> | <p>2 By 3 Edw. 1. c. 25. no officers of the king shall maintain suits in the king's courts, by covenant for profit. <i>Page</i> f. 3</p> <p>3 This means his courts of record only. 546. f. 4</p> <p>4 The word covenant signifies all kinds of promises and contracts whether by writing or parol. f. 5</p> <p>5 This act applies as well to personal as to real actions. f. 6</p> <p>6 Rent out of <i>land in variance</i> is within the act; not otherwise. f. 7</p> <p>7 In a <i>writ of Champerty</i> damage is not essential or whether the plea be determined or not. f. 8</p> <p>8 The maintenance is equal whether of the plaintiff or the defendant. f. 9</p> <p>9 But such grants only as are made <i>in consideration</i> of the maintenance are within the act. f. 10</p> <p>10 By 3 Edw. 1. c. 49. no judicial officers, &c. shall receive freehold in Champerty, pending a plea. f. 11</p> <p>11 This statute only extends to the officers therein named. f. 12</p> <p>12 And they shall not purchase pending plea however they may be related to the party, and although they do not maintain him. 547. f. 13</p> <p>13 By 28 Ed. 1. c. 11. none shall take upon him any suit, or covenant to give up his right to another, &c. f. 14</p> <p>14 A conveyance executed, hanging a plea, in consequence of a previous bargain, is not within the act. f. 15</p> <p>15 Champerty may be in actions, real, personal, or mixed, or in suits in equity. f. 16</p> <p>16 The voluntary gift of a chattle interest pending a plea is within the act. f. 17</p> <p>17 A surrender by lessee to lessor is not within it. f. 18</p> <p>18 Nor any conveyance of lands by father to son, ancestor to heir apparent. 548. f. 19</p> <p>19 A gift of part of the land, to a counsellor <i>for his wages</i> after the suit is determined is not within the act, unless in consequence of a previous bargain. f. 20</p> <p>20 By 31 Eliz. c. 5. Champerty may be laid in any county. f. 21</p> |
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CHAIN.—*Vide Fences.*

CHAIRMEN.

- 1 By 9 Ann. c. 23. Hackney chairmen and coachmen are permitted to ply within the bills of mortality on a Sunday. 12

CHALLENGE.

- 1 To challenge another; to carry a challenge, or to provoke a challenge is a very high offence, punishable by fine and imprisonment. 266. f. 3
- 2 By 9 Ann. c. 14. f. 8. to challenge another on account of money won at play, incurs a forfeiture of goods and two years imprisonment. *ibid.* If death ensues in consequence of a challenge it is murder. 123. f. 24.

CHAMPERTY.—*Vide Maintenance. Embracery. Buying a pretended Title.*

- 1 Is a species of maintenance. 545. c. 841
- 20 By 31 Eliz. c. 5. Champerty may be laid in any county. f. 21

CHANCE.

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CHANCE MEDLEY. — *Vide Manslaughter.*

- 1 Homicide without malice, is *sometimes* called chance medley which signifies killing on a sudden quarrel, or in the commission of an unlawful act. Page 115. f. 1
- 2 And being without premeditation there can be no accessaries before. f. 2
- 3 Where the trespass of a stranger authorized by the duty of a game-keeper will reduce homicide to chance medley. 112. f. 8

CHANCERY.

- 1 It is agreed, contrary to former opinions, that suits in chancery to be relieved against a judgment at law, are not within the statute of 16 Rich. 2. c. 5. &c. 80. f. 17
- 2 The provisions of 21 Jac. 1. c. 3. respecting suits to be relieved against monopolies, extends to the court of chancery, &c. 473. f. 31

CHANCELLOR.

- 1 By 25 Edw. 3. if a man slay the chancellor, being in his place, during his office, it is high treason. 60, 61
- 2 On information to the chancellor, &c. of servants riotously spoiling their deceased master's goods, a proclamation may be issued, and if they do not appear, they shall be attainted of felony. 197

CHAPLAIN.

- 1 A master may accompany his *domestic chaplain* to retain counsel, or to engage counsel, and may stand by him at his trial without being guilty of maintenance, &c. 541. f. 23

CHARMERS. — *Vide Witchcraft.*

- 1 Charmers or sorcerers were those who by certain incantations pretended to produce supernatural events. Page 8
- 2 This offence was punishable as witchcraft, and by the writ *de heretico comburendo*, on relapse after sentence. f. 1
- 3 One taken with the head of a dead man, &c. brought into the king's bench and sworn, that he would no longer be a forcerer. f. 3
- 4 The degrees of forcery described and punished by 1 Jac. 1. c. 12. repealed by 9 Geo. 2. c. 5. &c. 8, 9

CHACE. — *Vide Hunters, Fences.*

- 1 By 6 Geo. 3. c. 48. and 13 Geo. 3. c. 33. whoever shall destroy the kind of trees therein named in any of his majesty's chaces shall be fined, &c. for the two first offences and transported for the third. 216
- 2 By 9 Geo. 3. c. 41. the above act extends to underwoods, &c. and to all the king's chaces within the realm. 207
- 3 The punishment of such as shall destroy the banks, ditches, or fences of chaces. 192
- 4 The punishment for unlawfully hunting fallow deer in any chace, &c. 189

CHASTITY. — *Vide Homicide.*

- 1 A woman may justify murder in defence of it. 108 (N) 1
- 2 So a husband is justified in protecting the chastity of his wife. *ibid.*
- 3 It is the pride of nature, and most lovely characteristic of the sex. *ibid.*
- 4 But the bare solicitation of chastity is not an indictable offence. 357, c. 74
- 5 Nor is the actual violation of a daughter's chastity considered as an injury, unless

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unless in the character of a servant,
her service is thereby lost. *Page*

CHEATS.

- 1 Cheating consists in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of honesty. 343, c. 71
- 2 But an imposition effected by means of a *bare naked lie*, without the intervention of any artful contrivance, is not cheating, punishable criminally. 344 f. 2
- 3 Common cheating is punishable with fine and imprisonment. f. 3
- 4 By 33 Hen. 8. c. 1. whoever shall falsely and deceitfully obtain the goods, &c. of another, by colour and means of any *false privy token* shall be corporally punishable in any degree under death, as pillory, &c. f. 4
- 5 The offence may be tried at sessions; and the justices may convene suspected offenders. f. 5
- 6 An instance of an offender being fined under the act: *sed vide Coke's opinion* (3 Inst. 123) that it cannot be done. f. 6
- 7 Cases, &c. determined upon this act. 345 (N) 2
- 8 By 30 Geo. 2. c. 24. whoever shall by *false pretences* obtain the property of another, *with intent* to cheat and defraud any person, he shall be publicly whipped, or fined and imprisoned, or transported, as the court shall think fit. 345 f. 7
- N. B. No *certiorari* lies on this statute (N)
- 9 By 16 Car. 2. whoever shall *win* any sum or valuable thing, by any fraud or ill practice, shall forfeit treble value, &c. &c. f. 8
- 10 By 9 Ann. c. 14. the offender shall forfeit five times the value, be deemed infamous, and suffer corporal punishment, as in cases of perjury. f. 9
- 11 But the judgment can only be *quod convictus est*, and the fine must be recovered by action. *ibid.* (N)

Vol. I.

CHEESE.—*Vide Butter.*

CHEQUER ROLL.

- 1 By 3 Hen. 7. c. 14. If any of the chequer roll of the king's household under the state of a lord, make confederacy to destroy or murder the king, or any of the sworn council, he shall be guilty of treason. *Page* 74. f. 13

CHILD.—*Vide Bastard. Marriages. Vagrants.*

- 1 A child under the age of seven years cannot be punished for any criminal offence. 1 (N) 1
- 2 But he may be compelled, in a civil action, to make compensation.
- 3 How far a thing shall be forfeited as a deedand for the death of a child. 100
- 4 By 4 and 5 P. & M. c. 8. to allure or take away a woman child, is two years imprisonment, &c. 172

CHOSE in ACTION.

- 1 Is not within 21 Hen. 8. c. 7. for punishing servants who steal the goods delivered to them by their masters. 139. f. 14
- 2 By 15 Geo. 2. c. 13. if any of the servants of the bank shall embezzle certain choses in action, with which they are intrusted, they shall be guilty, without clergy. f. 17
- 3 By 5 Geo. 3. c. 25. the same is inflicted on servants of the post office. 140
- 4 By the common law, a *chose in action* cannot be the subject of larceny. 142
- 5 But by 2 Geo. 2. c. 25. whoever shall steal certain securities therein named, notwithstanding they are termed in law, choses in action, shall be guilty of felony of the same nature and degree, as they would be for

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taking

A TABLE OF PRINCIPAL MATTERS.

taking the money thereby secured.
Page 142 f. 22

CHRISTIANITY. — *Vide Church.
Religion. Heresy. Popery. Trinity.*

- 1 The punishment of those who shall deny the truth of the christian religion, &c. 7. f. 11
- 2 Christianity is part of the common law of England. *id.*
- 3 Publishing a book to prove the king's government antichristian, &c. may be alledged as an overt act of compassing his death. 56. f. 31

CHRISTMAS DAY.

- 1 By 13 Geo. 3. c. 80. to kill game, &c. on Christmas day incurs fine, &c. 12

CHURCH.—*Vide Popery.*

- 1 The punishment of absenting from it. 19. c. 10
- 2 By 1 Eliz. c. 2. all persons, having no reasonable excuse, shall resort to their parish church, or some other place of worship upon every Sunday, and there behave decently during divine service, upon pain of twelve pence for every offence. f. 1
- 3 By 3 Jac. 1. c. 4. this forfeiture may be levied by the church wardens by distress or warrant of a justice. (N)
- 4 It is incumbent on the defendant to shew the reasonable excuse, and needs not be regularly alledged in the indictment. 20
- 5 If the spiritual courts refuse a reasonable excuse, or derogate from the common law, they may be prohibited. f. 3
- 6 Whoever misbehaves, or quits church during service, is as much within the penalty as if he had been wholly absent. f. 4
- 7 Whoever is absent from his parish church shall be put to prove where he was. *ibid.*
- 8 The offence of absence need not be averred in any certain place, for being

a non-feasance, it is not committed any where. Page 20 f. 5

- 9 By 23 Eliz. c. 1. all persons above 16 years of age who shall offend against the tenor of the 1 Eliz. c. 2. shall, being lawfully convicted, forfeit 20*l.* for every month they shall so absent themselves from church. f. 6
- 10 This penalty of 20*l.* a month does not dispense with that of 12*d.* for every Sunday. f. 7
- 11 The words, "lawfully convicted" would have been implied by law. f. 8
- 12 No forfeiture accrues unless judgment follow conviction. *ibid.*
- 13 A condemnation on *demurrer*, or *nil dicat*, is sufficient. 21
- 14 A recusant shall not be excused from these penalties on account of sickness. f. 10
- 15 The month intended by the statute shall be computed by the number of days, allowing 28 to each month. f. 11
- 16 A *feme covert* is within these statutes. (N)
- 17 By 29 Eliz. c. 6. and 3 Jac. 1. c. 4. every offender convicted by the above statutes, shall pay 20*l.* for every month, after such conviction until he conform and come to church. f. 12
- 18 If the offender neglect to pay the forfeitures in the conviction, and the penalties of these statutes, the king may seize his personal, and two thirds of his hereditaments, leases and farms, notwithstanding any prior conveyance. f. 13
- 19 By 3 Jac. 1. c. 4. the king may resume the 20*l.* a month, and seize the hereditaments, &c. leaving the mansion house as part of the third part. f. 13
- 20 But this election waives the benefit of the 20*l.* a month, and the seizure of the goods. f. 14
- 21 A bond may be taken as the goods of the offender. 22. f. 15
- 22 But no copyhold lands are liable to be seized. f. 16
- 23 By 3 Jac. 1. c. 4. the profits of the lands shall go to satisfy the 20*l.* f. 17
- 24 *Quere* if the king may seize an estate conveyed *bona fide* by another in trust for

A TABLE OF PRINCIPAL MATTERS.

- for a recusant. He may seize an estate granted to a recusant in trust to another. *Page 21 f. 18*
- 25 How the penalties shall be recovered. *ibid.*
- 26 By 3 Jac. 1. c. 4. One justice, on confession, or oath of one witness may issue a warrant to the church warden where the offender dwells to levy the twelve pence on the offender's goods, by distress, for the use of the poor. *23. f. 19*
- 27 The recovery of the 20 *l.* contained in the conviction may be recovered at the suit of the king by indictment in the king's bench, assizes, or sessions. *23, 24*
- 28 And if the offender do not appear upon proclamation, he shall stand convicted. *f. 22*
- 29 But such a conviction is no judgment, and therefore cannot be reversed by writ of error, but must be moved into the exchequer and quashed, nor shall such a forfeiture be within the exception of a general pardon. *f. 23*
- 30 If the proclamation do not pursue the statute, the conviction will be insufficient. *f. 24*
- 31 An appearance, unless entered of record, is not sufficient. *f. 25*
- 32 *Quere* if default to a proclamation will amount to a conviction in the king's bench. *f. 26*
- 33 On appearance of the defendant, the proceedings ought to be according to the common law. *f. 27*
- 34 By 3 Jac. 1. no such indictment shall be avoided for defect, other than by direct traverse to the point of not coming to church, *unless the defendant conforms.* *25*
- 35 But the party may plead any collateral matter as a pardon, or *autre fois acquit*, &c. *f. 28*
- 36 He may reverse a judgment after verdict for a defect to the king's pre-judice. *f. 29*
- 37 By 35 Eliz. c. 1. the said forfeitures may be recovered by action of debt, &c. at Westminster. *f. 30*
- 38 This statute was made to proceed against the husband for the recusancy of the wife, which could not be done by the indictment given by the former statute. *Page 24, f. 31*
- 39 On an indictment the husband could not be charged for the forfeiture of his wife. *ibid.*
- 40 But his lands, &c. in her right, may be seized on her conviction. *ibid.*
- 41 How informers may proceed. *f. 32*
- 42 By 23 Eliz. c. 1. forfeitures are distributed $\frac{1}{3}$ to the queen, $\frac{1}{3}$ to the poor, $\frac{1}{3}$ to the informer, by action of debt, &c. *26*
- 43 Offenders refusing to pay within three months after judgment, shall be committed until they pay or conform. *ibid.*
- 44 This clause extends to the 20 *l.* a month. *f. 33*
- 45 An informer may sue for his own third part or for the whole penalty. *f. 34*
- 46 An informer may sue for the forfeitures against one not proceeded against by the king. *f. 35*
- 47 The 29 Eliz. c. 6. extends only to indictments, but does not take away the jurisdiction of the common pleas or exchequer, as to information. *f. 36, 37*
- 48 A conviction at the king's suit may be pleaded to a suit by an informer. *27. f. 38*
- 49 It is doubtful whether the conviction of a feme covert can be pleaded to an information against her and her husband. *f. 39*
- 50 The right of seizure, given to the king by 29 Eliz. c. 6. does not extend to a conviction by action or information. *f. 40*
- 51 How the 20 *l.* a month after conviction shall be recovered. *f. 41*
- 52 By 29 Eliz. c. 6. & 3 Jac. 1. the offender, once convicted, shall pay 20 *l.* a month without any other indictment or conviction, into the exchequer every Easter and Michaelmas term, or the king may seize, &c. *f. 41*
- 53 But this clause extends to no convictions without judgment be given thereon. *28*
- 54 How it extends to conviction for default of appearance on proclamation. *ibid.*

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- 55 In what manner prosecutions shall be against the offender's land and goods. *Page 27. f. 43. 44*
- 56 No seizure can be made till inquisition found. *f. 45*
- 57 The king cannot, without inquisition, grant over the offender's goods. *29. f. 46*
- 58 By 3 Jac. 1. c. 5. no recusant convict shall be disabled from following *any profession, or being executors, administrators, or guardians, on pain of 100 l.* *f. 47, 48*
- 59 By 23 Eliz. c. 1. every person forbearing church twelve months shall on certificate thereof to the king's bench, be bound to good behaviour in 200 l. at least. *f. 49*
- 60 How the forfeiture may be discharged. *f. 50*
- 61 By 23 Eliz. c. 1. offenders conforming in the manner the act directs shall be discharged of all forfeitures. *f. 50*
- 62 By 29 Eliz. c. 6. an offender who conforms, or shall fortune to die, no 20 l. a month or seizure shall be made, while he continues to attend divine service. *30*
- 63 And by 1 Jac. 1. c. 4. a recusant conforming according to the above statutes shall be discharged of all penalties which he might sustain by reason of his recusancy. *f. 52*
- 64 This conformity may be pleaded against an informer as well as the king, by *audita querela* after judgment against an informer, and before execution against the king. *f. 53*
- 65 But the profits which have been seized shall not be restored. *f. 54*
- 66 The inheritance of the protestant heir shall not be liable to the recusancy of his ancestor, unless the two parts of the lands were seized during the life of the ancestor. *f. 55*
- 67 But a recusant heir must conform to free his fee simple lands from the conviction of his ancestor, whether the lands were seized or not. *f. 56*
- 68 How lands in fee tail may be seized by force of a judgment or proclamation. *ibid.*
- 69 By 3 Jac. 1. c. 4. whoever shall retain in his service any inmate who shall not go to some church or chapel where the common prayer is used, &c. for one month, shall forfeit 10 l. a month. *Page 31. c. 11*

CHURCH WARDENS.

- 1 By 3 Car. 1. c. 3. the penalties for keeping alehouses without licence to be levied by the church wardens to the use of the poor. *466*
- 2 By 21 Jac. 1. c. 7. the churchwardens oath enlarged to prevent offences contrary to 1 Jac. 1. c. 9. for restraining tippling. *467*
- 3 By 11 Geo. 2. c. 26. churchwardens, &c. required to carry hawken of brandy, &c. before justices. *467*
- 4 They may levy the forfeiture of 12 d. for not coming to church. *19*
- 5 They are excepted out of the test act of 25 Car. 2. c. 2. f. 17. *17. f. 4*
- 6 They may whip boys for playing in the church, or pull off the hats of those who refuse to take them off, or may gently turn out disturbers of divine service, without incurring the penalties of 5 & 6 Edw. 6. c. 4. *272. f. 29*

CISTEAUX.

- 1 By 2 Hen. 4. c. 4. to put in execution bulls purchased by those of the order of Cisteaux to be discharged tithes, is præmunire. *79*

CLANDESTINE.—*Vide Marriage. Smuggling.*

CLERGY.—*Vide Felonies.*

CLERGYMEN.

- 1 By 1 Eliz. c. 2. clergymen refusing to use the common prayer, or speaking in derogation of it, forfeit

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year's profit, and suffer six months imprisonment for the first offence, and deprivation for the second. *Page*

14. f. 2

- 2 How they may be described in a certificate on 5 Eliz. c. 1. for refusing the oaths. 82 f. 33

- 3 Are within the statute of highways. 377 f. 15

- 4 Are sufficiently shewn in an indictment, to be in holy orders by the word, *clericus*. 14 f. 3

CLIPPING.—*Vide Coin.*

- 1 Clippers of the coin are not within the statute of treasons. 62 f. 55

- 2 By 5 Eliz. c. 11. clipping, &c. any of the monies of this realm, or foreign money, suffered to be current by proclamation is made high treason. 63 f. 61

- 3 By 18 Eliz. c. 1. whoever, for lucre, shall diminish, lighten, &c. &c. any of the monies as aforesaid, shall be guilty of high treason, lose goods, &c. &c. and lands during life, but no corruption of blood. *ibid.*

- 4 Aiders, consenters, and abettors, are equally guilty. *ibid.*

CLOATHS.

- 1 Maliciously to destroy the garments of another in the public street is transportation. 238

COALS.

- 1 The coal bushel shall be round, and 19½ inches in diameter, and contain one Winchester bushel and one quart of water. 524

- 2 All sea coal brought into the Thames, shall be sold by the chaldron of 36 bushels; and coals sold by weight shall in proportion be ¼ 12 lb. *avoir-dupois* to every cwt. f. 130

- 3 Any three justices may set the price of sea coal, and if any person shall re-

fuse to sell, they may enter the place and sell the same. *Page* 524, f. 131

COAT ARMOUR.—*Vide Affrays.*

COERCION. *Vide Coverture, Treason.*

COIN.—*Vide High Treason.*

- 1 By 25 Ed. 3. c. 2. to counterfeit the king's money is high treason 61 f. 54

- 2 Those who coin the king's money, without authority, are guilty within this clause, whether they utter it or not. 62 f. 55

- 3 So also are the authorised *mintors*, if they coin it of baser alloy than the standard. *ibid.*

- 4 Receivers and comforters also are equally guilty, but clippers are not within *this* act. *ibid.*

- 5 But to compleat the crime, the counterfeiting must be such as to render the coin passable. (N) 13

- 6 And uttering false money is neither treason nor misprision thereof within *this* act. f. 56

- 7 And only gold and silver coined within the realm, by the king's authority, is "the king's money." f. 57

- 8 But by 1 Mar. c. 6. to counterfeit the gold or silver coin, *not of the realm*, made current by consent of the crown, or to aid or abet therein, is high treason. f. 59

- 9 And by 14 Eliz. c. 3. to counterfeit gold or silver coin, *not of the realm*, nor permitted to be current, or to aid or abet therein, is misprision of treason. f. 60

- 10 By 5 Eliz. c. 11. clipping, washing, rounding or filing, for lucre or gain, any of the proper monies of this realm, or of any other realm made current by proclamation, or aiding therein, is declared high treason. 63 f. 61

- 11 By 18 Eliz. c. 1. to impair, diminish, falsify, scale, or lighten, by any art or means, for *lucre or gain*, any *such* monies, or to aid or con-

R 3

sent

A TABLE OF PRINCIPAL MATTERS.

- sent thereto, is high treason, with loss of goods absolutely, lands during life only, but no corruption or loss of dower. *Page 63. f. 61.*
- 12 By 8 & 9 Will. 3. c. 26. whoever, except the minters, shall make, &c. any puncheon, counterpuncheon, matrix, stamp, dye, pattern, or mould, in or upon which shall be made, or which will make, the figure, stamp, resemblance, &c. (*infra*, No. 17.) of both or either of the sides of any current gold or silver coin, shall be guilty of high treason. *64*
- 13 Whoever shall make or mend, &c. any edger, or edging tool, instrument, or engine, not of common use in any trade, but contrived for marking the edges of money, with such letters or grainings, as those on money coined in the mint, shall be guilty of high treason. *ibid.*
- 14 Whoever shall make or mend, &c. any press for coinage, or any cutting engine, for making blanks, by force of a screw, out of flattened bars of gold or silver, shall be guilty of high treason. *ibid.*
- 15 Whoever shall, *knowingly*, have any such puncheon, counterpuncheon, matrix, stamp, dye, edger, cutting instrument, or other tool or instrument before mentioned, shall be guilty of high treason. *ibid.*
- 16 The words "pattern or mould," (*Vide supra* No. 12) are omitted in the above clause, (No. 15.) but it has been determined, that they are comprized in the words "tool or instrument;" and that the *special* term is sufficient in an indictment, without averring the thing to be a tool or instrument within the act. *63 (N) 14*
- 17 It is also determined that if the *stamp* of the coin is impressed or formed, in, or upon any of the instruments enumerated in the act, it is immaterial whether it be laid in the indictment as an instrument on which the resemblance of the coin is made, or an instrument which will make the resemblance (*Vide supra* No. 12). But it is better to lay the fact according to the statute. *Nota 15.*
- 18 Counsellors, procurers, aiders, &c. are within this act, but no corruption of blood or loss of dower shall ensue. *Page 64*
- 19 By 7 Ann. c. 25. prosecutions upon the above statute, for making, &c. the tools or instruments therein prohibited, or for milling the edges of money, shall be commenced within six months. *ibid.*
- 20 By 8 & 9 Will. 3. c. 26. f. 2. to convey or assist in conveying any coining tools out of the *mint*, is high treason. *ibid.*
- 21 Or to mark the edges of any of the current, diminished, or counterfeited coin of the kingdom, with the *usual* letters or grainings, or to counsel or assist therein, is high treason. *ibid.*
- 22 Whoever shall colour, gild, or case over, with gold or silver, or with any wash, or materials producing the colour of gold or silver, any of the current coin, or blanks of base metal of a fit size to be coined into counterfeited milled money; or shall aid or abet therein, are declared guilty of high treason. *ibid.*
- 23 It has been adjudged immaterial whether the colouring be *put on*, or made to *arise out of* the subject coloured. (N) 16
- 24 Coining tools or instruments found in the custody of any person not a *minter* may be seized, carried before a justice, produced at the trial, and there destroyed. *65*
- 25 By 15 Geo. 2. c. 18. to wash, gild, or colour, or to add to, or alter the impression of any shilling or six pence real or counterfeited, with intent to make them resemble, either a guinea or half guinea, is high treason. *f. 64*
- 26 So also to file, alter, wash, or colour any halfpenny or farthing with intent to make them respectively resemble either a shilling or a sixpence is high treason. *ibid.*
- 27 Counsellors, aiders, abettors and procurers are within this statute. *ibid.*
- 28 The counterfeit money must be in the *likeness and similitude* of the lawful money. (N) 17
- 29 By

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- 29 By 25 Ed. 3. c. 2. to bring false money into the realm, counterfeit according to the similitude of the money of *England*, to merchandize, or make payment with, is high treason. *Page 61. 65*
- 30 By 1 & 2 P. & M. c. 11. to bring into the realm, money, counterfeit to foreign coin current here, is high treason. *ibid.*
- 31 The party bringing must know it to be false. *f. 66*
- 32 It must be from a foreign nation, and not from any place subject to the British throne. *f. 67*
- 33 The bare uttering is not within these statutes. *66*
- 34 By ancient statute a suspected person may be arrested for having false money. *f. 68*
- 35 And *quare*, if the money need to be actually merchandized with, or paid away (*Vide* No. 29, 30.) *f. 69*
- 36 The standard of coin is 2 car. copper to 22 car. of gold, 18 dwts. copper to 11 oz. 2 dwts. silver. 70 (N) 1
- 37 The standard can only be altered by parliament. *ibid.*
- 38 By 9 & 10 W. 3. c. 21. and 13 Geo. 3. c. 71. Gold or silver money diminished, or counterfeit may be cut by the person to whom tendered. But at his risk if it prove otherwise. *71. f. 3*
- 39 By 15 Geo. 2. c. 28. Knowingly to utter any false or counterfeit money incurs, for the first offence, six months imprisonment and surety for six months more. For the second offence 2 years imprisonment and surety for 2 years. The third offence is death. *f. 4*
- 40 To tender in payment any *such* money, twice within ten days, or to have one or more pieces thereof in custody, besides what is tendered, is, for the first offence, two years imprisonment and two years security. The second offence is death without clergy. *ibid.*
- 41 The prosecution must be within six months. *ibid.*
- 42 To coin or counterfeit a $\frac{1}{2}$ or $\frac{1}{4}$ is two years imprisonment. *72*
- 43 But by 11 Geo. 3. c. 40. to commit, or to aid or assist in this offence is felony. *Page 72, f. 5*
- 44 To buy, sell, take, receive, pay, or put off any counterfeit copper money not cut in pieces, at a lower rate or value than it imports to be of, or was counterfeited for, is felony. *ibid.*
- 45 A justice on the oath of one witness may issue a warrant to search for coining instruments, &c. *ibid.*
- 46 By 13 Eliz. c. 2. those who forge foreign coin not current here, their aiders, &c. are guilty of misprision of treason. *87 f. 7*

COLONIES.—*Vide Transportation.*

COLLATERAL.

- 1 A collateral issue may be pleaded and replied to *ore tenus*, and a *venire* awarded, returnable *intra*. 3(N) 5

COLLUSION.

- 1 If any serjeant, pleader, or other, be guilty of collusion, how he shall be punished. *542 f. 29*

COMBINATIONS.—*Vide Conspiracy.*

COMBUSTIO DOMORUM.—*Vide Arson.*

COMBAT.

- 1 The victor, in a judicial combat, is justified from the imputation of murder, and the reason of it. *107 f. 16*

COMMAND.

- 1 A forcible entry, committed by the command of an infant or feme covert, *R r 4* will

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will not involve them in the guilt.
Page 283 f. 35

COMPOS MENTIS.—*Vide Nov Compos.*

COMMISSIONERS.—*Vide Bankrupt.*

COMMON.

1 A common is not within the statutes of forcible entry. 282

COMMON COUNCIL MAN.

1 Is within the corporation act of 13 Car. 2. 15 f. 1

COMMON LAW COURTS.

- 1 Have no cognizance of *mere* heresy; but if the consequences of it become injurious to the public peace, the offender may be indicted. 6 f. 6
- 2 They may incidentally take cognizance of heresy, in judging of offences ordained by statute. f. 7
- 3 On a *quare impedit*, if the cause be heresy, the bishop must specify it particularly, that the temporal court may direct the jury accordingly. f. 7
- 4 But a person agrieved for heresy in a spiritual court, cannot move for a prohibition. f. 9
- 5 To draw any out of the realm, in plea, which belongs to the common law courts, or to sue in other courts to defeat the judgments given there, incurs *præmunire*. 79 f. 14, 15

COMMONS.

- 1 To assert that the house of commons or the house of lords, have legislative authority without the king, is treason. 69

COMMON WEALTH.

Offences against it are;

- 1 Imbezzling of Records. 177
- 2 A goaler forcing his prisoners to appear. 194
- 3 Obstructing lawful process. }
- 4 Escaping from custody. } Bk. 2.
- 5 Prison Breach. }
- 6 Rescous. }
- 7 Returning from transportation. 244
- 8 Theft bote. 252, 257
- 9 Knowingly receiving stolen goods. 232
- 10 Common Barratry. 524
- 11 Maintenance. 535
- 12 Champerty. 545
- 13 Compounding of informations. }
- 14 Conspiracy. 346
- 15 Perjury. 318
- 16 Bribery. 311
- 17 Embracery. 548
- 18 Extortion. 310

COMMON PRAYER.

- 1 The first establishment of it. 13, 14
- 2 By 1 Eliz. c. 2. ministers neglecting to use it, or speaking in derogation of it, forfeit one year's profit, and suffer 6 months imprisonment for the first offence, and deprivation for the second. 14 f. 2
- 3 Clergymen without a *cure* are within this act. f. 3
- 4 In an indictment, the word *clericus* is sufficient to shew they are within holy orders. *ibid.*
- 5 This statute does not restrain the spiritual court from proceeding against offenders, as disturbers of the unity and peace of the church, &c. f. 4
- 6 Also by 1 Eliz. c. 2. to detract the said book in plays, songs, &c. or to procure a minister to alter the form, or to let any other minister say a different form of prayer, is a forfeiture of 100 marks, or six months imprisonment for the first offence, 400 marks, or twelve months imprisonment for the second if not paid in six weeks.

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weeks, and for the third loss of goods and imprisonment for life. *Page* 400

- f. 5
 7 *Quare* whether the imprisonment shall ensue if the offender die without paying the penalty within six weeks. f. 6
 8 To disturb the reading of the common prayer is within the penalties of 1 Mary, f. 2. c. 3. 272 f. 30

COMPANION.

- 1 By 25 Edw. 3. if a man do violate *the King's Companion*, he is guilty of high treason. 50
 2 By the king's companion is meant his wife. *ibid.*

COMPUTATION.

- 1 A month shall be computed by the number of days, allowing 28 days to each, according to the common rule where a month is generally spoken of. 21 f. 11
 2 But an assurance for payment of money with interest, shall be computed by calendar months, for otherwise it would be usury. 530 f. 13
 3 How miles shall be computed. 35 f. 15
 4 In murder within a year and a day, the whole day on which the hurt was done, shall be reckoned first. 119 f. 9

COMPASS.—*Vide High Treason.*

CONCEALMENT.

- 1 Concealment, or procuring the concealment of felony, whether by common law or by statute, is misprision. 251 f. 2
 2 The concealment of treasure *trove* is misprision. (N) 1
 3 By 3 Edw. 1. c. 9. sheriff, coroner, or bailiff, &c. who shall conceal, consent, or procure to conceal the felonies done in their liberties, shall be fined and imprisoned at the king's pleasure. f. 3

4 By 3 Hen. 7. c. 1. justices may summon a jury to enquire of the concealments made by other inquests, &c. *Page* 251 f. 4

CONIES.

- 1 In a forest, chace, or warren, not the subject of larceny at common law. 144 f. 26
 2 By 9 Geo. 1. c. 22. to rob any place where conies are kept, being armed, and disguised, is felony without clergy. 187

CONFORMITY.

- 1 The offence in accepting or holding an office without due conformity to the church. 15 c. 4
 2 Non-conformity in officers consists in not receiving the sacrament and in attending other worship than the church. *ibid.*
 3 The offence of teaching school without conformity to the church. 18 c. 9
 4 For non-conformity of papists, &c. *Vide Church. Dissenters.*

CONSERVATORS.—*Vide Constable.*

CONSPIRACY.

- 1 A definition of conspiracy. 346 c. 72
 2 Barely to conspire to indict another maliciously, whether any thing be done in prosecution of such intent, or not, is conspiracy. f. 2
 3 But a bare conspiracy to indict another, will not maintain *the writ of conspiracy*. 347
 4 Nor can *the writ* be brought, unless the party indicted be acquitted. *ibid.*
 5 But, perhaps, a writ may be formed to meet the case of a person falsely indicted who has not been acquitted. *ibid.*
 6 And

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- 6 And it is certain that an *action on the case in the nature of such a writ* doth lie for a malicious prosecution, although it doth not proceed to an indictment. *Page 347*
- 7 And an indictment or information may be brought for conspiracies within the statute of Edward the First (vide p. 346) *348*
- 8 In an action for a malicious prosecution, the plaintiff must shew that the original suit is at an end. *ibid.* (N) 1
- 9 It is safest to form an indictment at common law, for a malicious accusation. *48*
- 10 And for this offence a man may be not only sentenced to the pillory but branded. *ibid.*
- 11 At common law, all confederacies wrongfully to prejudice a third person are criminal. *ibid.*
- 12 The offence consists in the conspiracy; and it is criminal to conspire to do a lawful act. *ibid.*
- 13 The fact of conspiring need not be directly proved; it may be collected from collateral circumstances. *ibid.* (N) 2
- 14 And if the parties concur in doing the act, although unacquainted with each other, it is conspiracy. *ibid.*
- 15 The insufficiency of the indictment; want of jurisdiction in the court; or the improbability of injuring the defendant, is no justification in conspiracy for a malicious prosecution. *f. 3*
- 16 Nor is it any plea that the party only intended to give evidence in the regular and legal course of justice. *349 f. 4*
- 17 But no juror is liable, to any prosecution, in respect to any verdict given by him, either upon a grand or petit jury. *f. 5*
- 18 Judges of record also, are freed from all prosecution for any thing done by them as judges. *350 f. 6*
- 19 Yet if a judge turn solicitor; tamper with witnesses, or labor jurors, he may be punished. *ibid.*
- 20 Conspiracy, upon the statute (Vide p. 346) must be both false and malicious. *Page 350 f. 7*
- 21 Therefore, if the defendants in a writ of conspiracy, can prove a probable cause, they shall be discharged. *ibid.*
- 22 But *quere* if it can be given in evidence on the general issue. *ibid.*
- 23 One person cannot be guilty of conspiracy upon the statute. *ibid.*
- 24 Therefore husband and wife cannot be indicted alone, for they are but one; and the acquittal of all but one, is an acquittal of all. *ibid.*
- 25 But an action on the case in the nature of a writ of conspiracy, may be brought against one only. *ibid.*
- 26 And if brought against several, and all but one be acquitted, yet judgment may be given against him. *ibid.*
- 27 A conspirator convicted at the suit of the party shall pay damages, and have fine and imprisonment. *f. 9*
- 28 When at the suit of the king, the *collateral judgment* was formerly given. *ibid.*
- 29 But this is obsolete; and the punishment is pillory, fine, imprisonment and surety for behaviour. *352 (N) 3*
- 30 Quarter sessions have jurisdiction, in conspiracy. *ibid.*
- 31 On motion to arrest judgment, the defendant must be personally present. *ibid.*

C O N S E N T.

- 1 In bigamy, if *either* of the parties are within the age of consent, *both* of them are protected, by the exception, from the penalties of 1 Jac. 1. c. 11. *174 f. 6*

C O N T E M P T S.

- 1 Against the king's palace. *87 c. 21*
- 2 Fighting therein, was anciently, a capital offence. *f. 1*
- 3 By *3 By*

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- 3 By 33 Hen. 8. c. 12. striking and drawing blood therein is punished with loss of the hand, perpetual imprisonment, and fine at pleasure. Page 87 f. 1
- 4 But *quere* if the king be not resident therein at the time of the offence. 88
- 5 The instance in 3 Inst. 140, for striking in the tower is not warranted by the record. *ibid.*
- 6 And *quere* if a peer can be imprisoned by the king's bench for the non-payment of a fine, *if it be exorbitant*, for this offence. (N) 1
- 7 Against the king's courts. 88 f. 3
- 8 Striking therein, where the king is only constructively, is an offence at common law, and more penal than striking where he is actually present. *ibid.*
- 9 For to draw a sword in the presence of one of the judges therein, whether he strike or not, or to strike a juror or other person, loses hand, goods, profit of lands, and if laid as *coram domino rege*, it is perpetual imprisonment. *ibid.*
- 10 To which *son assault demesne*, is no justification. f. 4
- 11 To rescue a prisoner from any of the courts, is loss of goods, profits of lands, and imprisonment for life, and if he strike, loss of hand. f. 5
- 12 An affray near the said courts, is fine and imprisonment. f. 6
- 13 Threatning, or reproachful words to a judge on the bench, is a high misprison. f. 7
- 14 To reflect on the justice and honour of those *high* courts, is an indictable offence. 89
- 15 Whoever gives the lie in Westminster-hall, sitting the courts, shall be bound to good behaviour. f. 9
- 16 To make an affray in the presence of the king's inferior courts is fineable, but no loss of hand. f. 10
- 17 To speak reproachfully to the judge of such a court in the execution of his office, is fineable immediately, and *perhaps* indictable. f. 11
- 18 Formerly slandering the justice of the nation was indictable. f. 12
- 19 But now the offender may only be bound to good behaviour, except the offence was committed against *such officers* in the actual execution of office. Page 89 f. 13
- 20 Instances of this kind for which a man shall *not* be indicted. 90
- 21 But the injurious treatment of persons under the protection of the king's courts is a contempt. f. 14
- 22 To suppress the truth during an examination is a contempt of court. f. 15
- 23 So also to dissuade a witness from giving evidence against a prisoner. *ibid.*
- 24 Or to advise a prisoner to stand mute. *ibid.*
- 25 If a grand jury discover to a person indicted, the evidence against him, it is high misprison. *ibid.*
- 26 Contempts against the prerogative. 91 c. 22
- 27 Refusing to assist the king for the national good. f. 2
- 28 As for a peer to neglect a summons to parliament. *ibid.*
- 29 Or to depart from thence without licence. *ibid.*
- 30 Or for a privy councillor to refuse his advice. *ibid.*
- 31 Or for a private subject to refuse to defend the kingdom against foreign invasion. *ibid.*
- 32 Preferring the interest of a foreign prince; or to receive a pension from him without leave, is contempt of prerogative. f. 3
- 33 To disobey what the law enjoins. f. 4
- 34 As refusing obedience to writs, &c. *ibid.*
- 35 Or not answering the privy council in matters of state. *ibid.*
- 36 Or refusing to give evidence to the grand jury. *ibid.*
- 37 Or not returning from beyond sea, upon notice. *ibid.*
- 38 Or going beyond sea against a *ne exeat regnum*. *ibid.*
- 39 So also every contempt of a statute is indictable, if no other punishment be limited. 92 f. 5
- 40 Neglecting to join the *posse comitatus* is a contempt. (N) 1
- 41 Contempts

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41 Contempts against the king's person.

Page 96 c. 23

42 Spreading false rumours concerning the king's intentions. f. 4

43 Charging him with a breach of his coronation oath. f. 5

44 Speaking contemptuously of him. 93 f. 6

45 Of contempts against the government. 92 c. 23

46 As charging it with oppression or weak administration. f. 1

47 Or absolving persons at the gallows. 2

48 Or drinking to the pious memory of a traitor, &c. *ibid.*

49 Or endeavouring to frighten the king into a change of measures. f. 3

50 And perhaps to refuse the custom in a foreign port. 93 f. 7

51 Contempts against the king's title. 93 c. 24

52 How far the offence of denying his title is a contempt. 93. 94

53 How far refusing to take the oath of allegiance is a contempt of the king's title, at common law. 94. 95

54 How far refusing to take the oaths of allegiance, supremacy, and abjuration, as directed by statute, is a contempt, &c. 95 to 99

CONSTABLE.

1 Constables are not within the test act. 25 Car. 2. c. 2. 17 f. 4

2 Every high and petty constable is a conservator of the peace, by common law, within their several limits. c. 63 f. 14

CONTINGENCY.

1 How far a person who has only a contingent interest may maintain another in a suit on the subject on which the contingency is to operate. 538 f. 14, 15

CONTRA PACEM.

1 The words *contra pacem* are essentially necessary in an indictment for barratry. Page 526, l. n

CONVENTICLES.

1 Established for diffusing heretical tenets can only become the subject of indictment at common law, when they raise factions which may tend to disturb the public peace. 616

2 By 1 Mary, f. 2. c. 3. certain disturbers of licensed conventicles, as directed to be punished in a summary way. 272 l. p

3 The King's Bench will grant an information for disturbing protected dissenters conventicles. 49 (N)

CONVICTS — *Vide Transportation.*

CONVICTION. — *Vide Heresy, Felony by Statute.*

1 It is always implied by law, that there must be a conviction before punishment. 2018

2 A conviction is of no effect unless judgment be given thereon. *ibid.*

3 For every judgment implies a conviction; but a conviction does not imply a judgment. 21

4 A party has no remedy against an insufficient conviction but to move it into the superiour court, and quash it. 24

5 What conviction will be sufficient for absenting from church. 24

6 How far a conviction may be pleaded in bar to a subsequent prosecution. 4

7 An additional punishment for a second offence, can never be inflicted, unless there has been a previous conviction for the first offence. 67 f. 74 168 l.

CONVOCAATION

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CONVOCA TION.

- 1 The convocation may declare what opinions are heretical. *Page 6 f. 3*
- 2 But cannot convict a heretick. *ibid.*

C O P Y.—*Vide Books. Authors.*

- 1 Copying a libel has been held conclusive evidence of publication; except some subsequent act is done to explain the precedent intention. 355 f. 10

C O P Y H O L D.

- 1 Not liable to be seised for recusancy. 22 f. 16

C O R O N A T I O N O A T H.

- 1 To charge the king with a breach of his coronation oath is a contempt against his person. 96 f. 5

C O R P O R A T I O N.

- 1 Must repair their own bridges. 445 f. 8
- 2 Aggregate, may be bound to repair bridges, either by special tenure, or prescription. 443 f. 2
- 3 May be compelled to repair highways by force of a general prescription. 369 f. 8
- 4 May set the price of victuals notwithstanding the 25 Hen. 8. c. 2. 481 f. 8
- 5 Are punishable for riot in their natural, but not in their public capacity. 298 f. 13
- 6 How they may be punished for suffering riots. *ibid.*
- 7 The corporation act. 16

C O R N.

- 1 To assault with intent to hinder the exportation of corn, is a misdemeanor punishable by hard labour for three months, &c. &c. 243 app. 12
- 2 To commit the offence a second time, or to destroy any store-house or gra-

nary in which corn is lodged for the purpose of exportation; or to spoil the grain therein, is transportation for seven years. *Page 243 f. 2*

- 3 The hundred liable to the damage not exceeding 100 l. 244 f. 3
- 4 Punishment for selling corn otherwise than by the Winchester bushel. 486
- 5 If any magistrate shall permit it to be otherwise sold, he shall forfeit 5 l. *ibid.* f. 2
- 6 The manner in which corn shall be measured. f. 3 & 4
- 7 By 22 and 23 Car. 2. c. 7. to burn stacks or ricks of corn, &c. is felony. 166 f. 2
- 8 And by 43 Eliz. c. 13. if committed in any of the four Northern counties it is felony without clergy. *ibid.*
- 9 By 9 Geo. 1. c. 22. whoever shall set fire to any stack of corn shall suffer death without clergy. 224

C O R O N E R.—*Vide Deodand, Inquisition.*

- 1 There can be no forfeiture as a *deodand*, nor can any thing be seised as such, till it be found by the coroner's inquest to have caused a man's death. 101 f. 8
- 2 But after the coroner has made his inquisition, which ought to find the value, the sheriff is answerable for it and may levy for it on the town *where it fell*. 101, 102
- 3 If the coroner neglect to make an inquest, it cannot be taken by the grand jury. (M) 37
- 4 When taken by the coroner it may be moved and traversed. *ibid.*
- 5 The personal estate of a *felo de se* is not vested in the king until the coroner has taken his inquest. 104
- 6 Such inquisitions ought to be by the coroner, *super visum corporis*, if the body can be found. *ibid.* f. 10
- 7 And it is said *this kind* of inquisition cannot be traversed. *ibid.* f. 11
- 8 The coroner has only authority *super visum corporis*, and if the body cannot be found, the inquisition may be taken

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taken by the King's Bench, or by a justice of the peace. *Page* 104 f. 12
 9 And *their* inquisition may be traversed. *ibid.*

- 10 The manner in which their inquisitions ought to find the fact. f. 13, 14
- 11 If they be full in substance, the coroner may be served with a rule to amend defect of form. f. 15
- 12 For murder or manslaughter, the party is always arraigned and tried upon the coroner's inquest, as well as upon the indictment.

C O S T S.

- 1 By 5 Eliz. c. 14. the defendant convicted of forgery, shall pay double costs. 339
- 2 By 21 Jac. 1. c. 3. there shall be double costs against monopolisers. 474

C O T T O N S.—*Vide Forgery.*

- 1 The punishment for cotton manufacturers assaulting or abusing their masters. 239
- 2 By 22 Geo. 3. c. 40. whoever shall enter by force any place, with intent to destroy any callico, cottons, &c. in the loom, or shall actually cut the same out, or destroy any of the utensils, &c. shall be guilty of felony without benefit of clergy. 240, 241
- 3 By 4 Geo. 2. c. 16. and 18 Geo. 2. c. 18. to steal cottons from bleaching or printing grounds, is felony without clergy, but the judge may transport for 14 years 146 (N) 13

CORRUPTION OF BLOOD.

- 1 Where a statute saves the corruption of blood, it impliedly saves the descent of the land of the offender to the heir. 169. f. 5
- 2 It is the immediate consequence of an attainder.
- 3 This consequence is saved by a variety of statutes.

- 4 The blood of a *felo de se* is not corrupted. *Page* 103. f. 8

C O V E N A N T.

- 1 The word "covenant" in 3 Edw. 1. against champerty, includes promise either by writing or parol. 546. f. 5

COVENTRY ACT.—*Vide Main.*

- 1 By 22 & 23 Car. 2. c. 1. whoever shall, by lying in wait, disable the tongue, put out the eye, slit the nose, cut off the lip, or any limb or member of another *with intent* to maim or disfigure, he, his aider, &c. shall suffer death without clergy. 176

COUNCIL and COUNSELLOR. *Vide Barrister.*

- 1 By 5 Eliz. c. 14. counsellors shall not be punished for shewing a false deed in evidence.
- 2 By 3 Jac. 1. c. 5. no popish recusant shall be a counsellor.
- 3 If a privy councillor refuse the king his advice, it is a contempt of the prerogative. 91. f. 2

COUNTERFEITER.—*Vide Treason. Felony. Forgery.*

C O U N T Y.

- 1 By 33 Hen. 8. c. 23. traitors or principal murderers, by order of the privy council may be tried, by special commission, in *any* county. 119. f. 11
- 2 By 27 Hen. 8. c. 4. and 28 Hen. 8. c. 15. a murder done at sea, may be tried in any county. *ibid.* f. 12
- 3 By 2 Geo. 2. c. 21. Principals and accessaries to a murder, where the stroke, &c. is at sea, and the death on land, or *e converso*, may be tried in the county where either the death or stroke shall be. 120

4 By

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- 4 By 2 & 3 Edw. 6. c. 24. a wound in one county, and the death in another, shall be tried in the county where the death shall happen. Page 121
- 5 By 26 Hen. 8. c. 6. a murder in Wales may be tried in the next adjoining English county. ibid. f. 14
- 6 But appeals must be brought in the proper county. (*See* vide 2 Geo. 2. c. 21.) ibid.
- 7 Larceny in one county, and the goods carried into another county, the offender may be indicted in either. 136. f. 9
- 8 But in a robbery at sea, the pirate cannot be indicted in the county to which he carries the goods taken. 137
- 9 By 13 Geo. 3. c. 31. Larceny in Scotland may be tried in any county where the goods are found, &c. and *converso*. ibid.
- 10 Which shall be considered as the next adjoining English county to Wales. 220, 221

COURTS.—*Vide Transportation.*

COVERTURE.

- 1 The coverture of a woman protects her from punishment for committing bare thefts in company with, or coercion of her husband. 4
- 2 This exemption extends to burglary, and *seemingly* to robbery. *ibid.* (N) 8
- 3 It also protects her from being an accessory in felony by receiving her guilty husband. f. 10
- 4 And in treason, from being deemed a principal by such reception. (N) 9
- 5 But coverture will not protect a wife for a theft committed of her own voluntary act, &c. f. 11
- 6 Nor will it protect her from the consequences of treason, murder, or robbery (*quere*) under any circumstances. ibid.
- 7 Nor for receiving stolen goods without her husband's privity. (N) 10
- 8 Nor is it any protection to a malicious appeal. f. 13

- 9 And in general, coverture is no protection for any offence *not capital*, against the common law or statute. Page 4. f. 13
- 10 A wife cannot commit larceny of the goods of her husband, by reason of the coverture. 141. f. 19
- 11 Coverture no protection in forcible entry. 283. f. 35

CREEKS.—*Vide Piracy.*

- 1 Of felonies committed therein. 152. c. 37

CRIMES.

- 1 What persons may be guilty of them. 1
- 2 Neither infants, ideots or lunatics can be punished for crimes. 2
- 3 Formerly held, that a mad man might be punished for treason. ibid.
- 4 Whoever is guilty of a crime through drunkenness shall be punished. 3
- 5 Whoever incites a mad man to commit a crime, is a principal offender. f. 7
- 6 How far a *feme covert* is punishable for crimes. 4
- 7 A crime committed by a son or a servant shall not be excused by the command either of parent or master. 8
- 8 How those who charge another with the crime of witchcraft shall be punished. 9

CROWN.

- 1 Every king in actual possession of the crown, is a king within 25 Ed. 3. c. 2. 52
- 2 The crown descends to the heir within this act, before his coronation. 53 f. 19
- 3 By 1 W. & M. c. 2. Papists are rendered incapable to possess or enjoy the crown of this realm. f. 21
- 4 Soliciting

A TABLE OF PRINCIPAL MATTERS.

- 4 Soliciting a prince, in amity with the crown, to invade the realm, is treason. *Page 56*

- 5 By 4 Ann. c. 8. to maintain that the pretended prince of Wales, or any other, hath any title to the crown otherwise than according to 1 W. & M. c. 2. or 11 & 12 W. 3. c. 2, or that the kings of this realm, by authority of parliament, are not able to limit and bind the crown, &c. is high treason. 69 f. 85

C R O W.

- 1 By 23 Geo. 3. c. 88. any person apprehended with a crow, intending to break any house, &c. shall be deemed rogue and vagabond. 165

CUCKING STOOL,

- 1 Sometimes called Ducking Stool, the usual punishment for a common scold. 365

C U R S I N G.

- 1 By 19 Geo. 2. c. 21. for profane cursing and swearing, every labourer, common soldier, or sailor, shall forfeit 1 s. every other person under the degree of a gentleman, 2 s. every person of above that degree, 5 s. 12 f. 4
- 2 On a second conviction the penalties shall be double, and for every other conviction treble the sum first forfeited. *ibid.*
- 3 If not immediately paid or secured, the offender being a labourer or gentleman shall be sent to the house of correction for 10 days, and a common soldier or sailor in employ shall be set in the stocks for two hours, &c. *ibid.*
- 4 A justice may convict on his own hearing, or on confession, or the oath of one witness. *ibid.*
- 5 The constable must inform if he knows the offender, if not, he must apprehend. *ibid.*
- 6 This act to be read in all churches after every quarter day. *ibid.*

C U T L A S S.

- 1 By 23 Geo. 3. c. 88. persons apprehended with a cutlass with intent to assault another shall be deemed rogue and vagabond. *Page 1*

CUT PURSE.—*Vide Larceny & Petty Stealing.*

CUTTING.—*Vide Maim. Hop Bin Coventry Act.*

C Y P H E R I N G.

- 1 By 5 Eliz. c. 1. whoever, by writing cyphering, &c. shall extoll the Pop jurisdiction, shall be guilty of a *perjury*. 67 f.

D.

D A M A G E S.

- 1 The double damages given by 5 Eliz. c. 4. for forging a release of an obligation, &c. shall be governed by the penalty. 342 f. 2

D E A D B O D Y.

- 1 To take a dead body from the grave to be used in witchcraft was within 1 Jac. 1. c. 12. now repealed.

D E A D L Y F E U D.

- 1 By 43 Eliz. c. 13. to burn any barn or stack of corn or hay, or to prey or make spoil of the persons or goods of the subject upon *deadly feud* in the four Northern counties is felony without clergy.

D E A T H

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DEATH.—*Vide Homicide. Casual Death, Deodand.*

DEBATING.

- 1 By 21 Geo. 3. c. 49. all houses for publicly debating, &c. on any part of the Lord's day to which persons shall be admitted for money, or by charging an unusual price for refreshments, &c. shall be deemed a disorderly house, and the keeper, master, and director thereof, subject to fine and imprisonment. Page 12

DEBTS.

- 1 A Popish heir has no other mode of exonerating the inheritance from the debts due by the recufancy of his ancestor than to conform. 30 f. 56

DEBTORS.

- 1 Insolvent, may be brought to the quarter sessions and obliged to deliver a schedule of their estate and effects, and for perjury therein, or in refusing, for 40 days, to deliver such schedule, guilty of felony without clergy. 204 f. 4

DECETS.

- 1 Deceitful practices, to defraud another of his known right *by means of artful devices*, contrary to the plain rules of common honesty, are punishable at common law. 343
 2 Instances of this species of deceit. *ibid.*
 3 The deceit must be accompanied with *an artful contrivance*, and not wholly depend on a bare naked lie. 344
 4 By 33 Hen. 8. c. 1. deceitfully to obtain the property of another by any privy false token, or fictitious letter, &c.

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shall be liable to any corporal punishment short of death. Page 344 f. 4

- 5 The offender may be tried before the chancellor, or at the assizes, or quarter sessions, &c. *ibid.*
 6 And there has been an instance of a person fined 500*l.* upon this statute. 345
 7 Instances of what shall be considered a privy false token. (N^o 2
 8 By 30 Geo. 2. c. 24. to obtain property *by false pretences*, with intent to cheat another, subjects the offender to pillory, whipping, fine, imprisonment or transportation. f. 7
 9 By 16 Car. 2. c. 7. deceitfully to defraud another at any of the games mentioned in the act, subjects the offender to forfeiture, &c. of treble value. f. 8
 10 By 9 Ann. c. 14. to win money by any deceitful practice, subjects the offender to five times the value won, renders him infamous, and liable to punishment as in cases of perjury. f. 9.
 11 No counsellor or attorney can justify using *any* deceitful practice in maintenance of a client's cause. 542 f. 29
 12 By 11 West. 1. c. 29. if any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, &c. he shall be disqualified, &c. &c. *ibid.*

DECIES TANTUM.

- 1 By 38 Edw. 3. c. 12. if any juror take bribe to give their verdict, he shall pay *ten times as much* as he hath taken, half to any who will sue for the same as directed by 34 Edw. 3. c. 8. 551
 2 It is a good plea in bar to actions of *decies tantum*, that there was no such cause as that in which it is alleged the juror was bribed. f. 11
 3 A variance between the first record and the declaration on this statute will abate the writ. *ibid.*
 4 But only so much of the record need be stated as is necessary to give the plaintiff his action. *ibid.*

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| <p>5 The declaration must shew that the bribe was given to the juror. <i>Page 551</i>
f. 12</p> <p>6 So also the precise sum given must be stated. f. 13</p> <p>7 But money given after verdict, is not within the act, unless in consequence of a previous contract. f. 14</p> <p>8 Whether a verdict was, or was not given, is immaterial. f. 15</p> <p>9 If several be joined in one action they should plead separately. 552</p> <p>10 Which should be a special denial if not receiving the money and not the general issue. f. 17</p> <p>11 The plaintiff shall be paid his moiety or a <i>decies tantum</i> before the king, &c. f. 18</p> <p>12 The husband may sue alone, although the offence were committed in a suit to which both husband and wife were parties. f. 19</p> <p>13 No colourable purchase of land shall evade the statute. f. 20</p> <p>14 This action may be barred by the king's release, <i>before action brought by the informer.</i> f. 21</p> <p>15 Outlawry lies not in <i>decies tantum</i>, only a <i>capias</i>, and distress infinite. f. 22</p> <p>16 And no <i>capias</i> lies in a foreign country. <i>ibid.</i></p> <p>17 The penalty can only affect lands had at the time of the <i>decies tantum</i>, &c. f. 53</p> | <p>3 By 9 Geo. 1. c. 22. if any person appear <i>armed and disguised</i> in a closed place wherein any deer are kept, or shall unlawfully buy or destroy any fallow deer; or <i>armed and disguised or not</i>, shall steal any red deer in the enclosed chases or forests, shall without clergy.</p> <p>4 The offender may be proclaimed not submitting, he shall be guilty of felony without clergy.</p> <p>5 By 5 Geo. 1. c. 28. who shall enter into any inclosed ground where deer are usually kept, and hunt or kill any red or fallow deer without licence from the owner shall be transported for seven years.</p> <p>6 By 16 Geo. 3. c. 30. who shall kill, &c. or <i>attempt to kill</i>, or destroy, or shall steal any deer, or shall aid therein, shall be liable to 20<i>l.</i> for attempting, &c. for killing, &c. if a keeper, do on a second conviction of any offence, the offender shall be transported.</p> <p>7 Justices may search for the skins of stolen deer, and if any be found and the party shall not give a satisfactory account how he became possessed of it, he shall forfeit any such skin, &c. between 10<i>l.</i> and 30<i>l.</i></p> <p>8 And if the person in whose possession the same shall be found shall be liable to conviction, the justice shall summon all those through whose land such skin, &c. shall have passed.</p> <p>9 Whoever shall <i>lay snares</i> for deer shall be liable to 5<i>l.</i> to 10<i>l.</i> for every offence, and from 10<i>l.</i> to 100<i>l.</i> for every other.</p> <p>10 And whoever shall come into any ancient walk, inclosed ground, or park, <i>intent to shoot at or to take</i> any deer, the rangers may seize guns and powder in the same manner as game.</p> <p>11 And if any such person shall beat or wound any ranger, &c.</p> |
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D E C L A R A T I O N.

- 1 How far it is criminal to refuse the declaration against Popery. c. 14

D E E R.

- 1 By the common law, deer *feræ naturæ*, and roving at large, are not the subject of larceny. 144 f. 26
- 2 But if shut up in a house, or even inclosed in a park in such a manner as the owner may retake them whenever he pleases, felony may be committed by taking them. *ibid.*
- 3 And if any such person shall beat or wound any ranger, &c.

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assistants in the execution of his office, or shall attempt to rescue any offender, he shall be transported for 7 years. *Page 191 f. 10*

DEFAMATION.—*Vide Libel.*

D E F E N C E.

A man in defence of his person may justify killing another who assaults him feloniously. *109 f. 24*

But *quere*, if the assault is made where the person may safely retreat. *f. 25*

By 24 Hen. 8. c. 5. whoever shall be indicted for killing another attempting murder, robbery, or burglary, shall be fully acquitted and discharged. *110*

D E M O L I T I O N.

By 1 Geo. 1. c. 5. Riotously, tumultuously, and forcibly, to demolish or to pull down, or to begin to demolish or pull down, any church, chapel, or meeting-house, or any dwelling-house, barn, stable, &c. &c. is felony without clergy. *308*

By 9 Geo. 3. c. 29. the above act is extended to the demolition of all kind of mills. *309*

D E O D A N D S.

Is a forfeiture to the king of the instrument which occasions the death of another. *100*

Especially such as occasions casual death. *ibid.*

As where one is killed by a fall from a horse, cart, or other thing. *ibid.*

And it is due for the death of infants as well as adults

The origin of this forfeiture. *ibid.* (N) 1

Fixtures, as a wheel of a mill, &c. may be a *deodand*. *101*

But a ship is not. *ibid.*

8 And only the very particular part of the thing which causes the death, is forfeited. *P. ge 101*

9 Nothing forfeited if the party die not within the year and day. *ibid. f. 7*

10 Nor till after inquisition. *f. 8*

11 But it is an odious claim and not favoured by the courts *102 (N) 3*

D E R O G A T I O N.

1 To derogate from the king's common law courts is *præmunire*. *79 f. 14*

2 The punishment for speaking in derogation of the common prayer. *14 f. 5*

D E S E R T I O N.

1 By 1 Geo. 1. c. 47. if any person shall persuade a soldier to desert, he shall forfeit 40*l.* *75*

2 By 8 Hen. 6. c. 19. desertion was made felony, but this statute is obsolete. *184*

3 By 3 Hen. 8. c. 5. Desertion is felony without clergy. *185*

4 By 2 Edw. 6. c. 2. if any soldier shall depart without licence, &c. &c. he shall be guilty of felony without clergy. *ibid.*

DETAINDER.—*See Forcible Entry.*

D E M U R R E R.

1 Judgment on demurrer or *nihil dicit* is a sufficient conviction on the 23 Eliz. c. 1. for the penalty of 20*l.* a month for absents from church. 20 *f. 9*

DENIZEN.—*Vide Allegiance.*

D E N Y I N G.

1 It is a high contempt to deny the king's title. *93*

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DEPRAVING.

A TABLE OF PRINCIPAL MATTERS.

DEPRAVING.

- 1 The punishment for depraving the book of common prayer. *Page 14 l. 5*

DEPRIVATION.—See *Spiritual Courts.*

- 1 Ministers, offending against the 1 Eliz. c. 2. respecting the use of the common prayer, may be deprived by the spiritual court for the first offence. *14 f. 4*

DEPUTY.

- 1 A bond by a deputy of an office to pay a certain sum, at all events, is bribery. But a bond to pay half the profits, or a certain sum out of the profits of an office, for a deputation, is not. *313*

DICE.

- 1 Playing with false dice, is an indictable offence. *343 c. 71*
- 2 It is punishable with *infamy*, fine and imprisonment. *344 f. 3*
- 3 By 16 Car. 2. c. 7. if any person shall defraud another by playing at dice, &c. or by betting on the side of such as do play, he shall forfeit treble what is won. *345 f. 8*
- 4 By 9 Ann. c. 14. he shall forfeit five times the value, be deemed infamous, and suffer as in cases of perjury. *f. 9*

DIMINUTION.

- 1 By 18 Eliz. c. 1. to impair, *diminish*, falsify, scale, or lighten the coin, &c. is high treason. *63*

DISABILITY.

- 1 Those who are under a *natural disability* of distinguishing between good and evil; as infants under the age of

discretion, idiots, and lunatics, are not punishable by any criminal prosecution whatsoever. *Page 1, 2*

- 2 But in trespass, this disability shall not excuse from making a civil compensation for the injury. *3. l. 5*
- 3 In what cases a *feme covert* is disabled from committing crimes, by the command or coercion of her husband.
- 4 The disabilities to which a man is reduced by the offence of Popish recusancy. *32 to 35*
- 5 Disabling a man of those parts which abate his courage, &c. or which prevent his fighting, are held maims. *175*

DISCOVER.

- 1 What discovery is necessary to exempt a person from the crime of treason. *87*
- 2 What discovery will indemnify against the penalty for bribery at elections. *315*

DISCRETION.—*Vide Infancy. Lunatick. Idiot.*

- 1 Where the human mind is incapable of discretion, it is also incapable of guilt. *1*
- 2 Infants under the age of discretion are not punishable by any criminal prosecution. *1*
- 3 The law presumes them to have acquired discretion on the attainment of fourteen years of age. *(h) 1*
- 4 But from seven to fourteen years of age, if they appear to possess discretion they are liable to punishment. *ibid.*
- 5 But within the age of seven years, no discretion shall be presumed, whatever circumstance may appear. *ibid.*
- 6 Idiots and lunatics are supposed to be without discretion. *ibid.*
- 7 But every person of the age of discretion is presumed of sane memory unless the contrary appear. *3 (N) 1*
- 8 In what cases the magistrate may exercise his discretion in taking surety for the good behaviour. *261*
- 9 The measure of punishment for offenses to be regulated by the discretion of the judges. *270. l. 2*

A TABLE OF PRINCIPAL MATTERS.

- 10 How far the king's bench may exercise a discretion over the conduct of the justices granting a restitution of forcible entry. *Page* 292. f. 63 to 66
- 11 Persons wanting discretion who commit a trespass against another shall make reparation in damages. 3. f. 5
- 12 The indiscretion of drunkenness is no excuse from punishment. f. 6

DISFIGURING.—*Vide Maim.*

- 1 Cutting off the ear, nose, or the like, of another are not *maims* by the common law, because they do not *weaken*, but only *disfigure* the party. 176
- 2 By 22 & 23 Car. 2. c. 1. whoever shall, by lying in wait, cut out or disfigure the tongue, &c. or any limb or member of another with *intent to maim or to disfigure him*, his aiders, abettors, &c. shall be guilty of felony, *fans* *ibid.* clergy.

DISGUISE.—*Vide Black Act. Smuggling.*

DISMEMBERING.—*Vide Maim.*

DISOBEDIENCE.

- 1 It is a high contempt to disobey the king's lawful commands and prohibitions. 91

DISPENSATION.

- 1 No dispensation whatsoever shall restore an offender against 5 & 6 Edw. 6. c. 16. to a capacity to hold the office he has contracted for. 313. f. 5

DISSEISIN.—*Vide Forcible Entry.*

- 1 It is fatal to an indictment of forcible entry to alledge a *disseisin* of such estates of which a person cannot be disseised as a lease for years, a copyhold, &c. 285. f. 39
- 2 So also if it state the disseisin to be of land *ad tunc & adhuc existens liberum tenementum, l. s. &c.* *ibid.*
- 3 But *quere* if this repugnancy may not be reconciled by intending that the

disseisee might re-enter after the disseisin and before the indictment. *Page* 285. f. 39

- 4 In what manner the time and place of the disseisin in forcible entry are sufficiently set forth. 286. f. 42 to 45

DISSENTERS.

- 1 May by virtue of the toleration act, 1 W. & M. c. 18. refuse to take the oaths of office required by the corporation and test acts of 13 Car. 2. c. 1. and 25 Car. 2. c. 2. and may refuse to serve the office of sheriff, upon account of not chusing to take the oaths, &c. notwithstanding they be duly elected; and the 5 Geo. 1. c. 6. confirms officers in their offices who have not qualified as above required. 16 (N) 2
- 2 Dissenters taking the oaths directed by 30 Car. 2. are not within 23 Eliz. c. 1. 18 f. 3
- 3 Protestant dissenters exempted by the toleration act from all penal laws relating to religion, except 25 Car. 2. c. 2. and 30 Car. 2. c. 1. provided they take the oaths, &c. and attend a registered place of worship, &c. 47
- 4 In registering such place, the justices are merely ministerial; and if the parties are not within the certificate, they are not protected. 47 (N) 1
- 5 Nor will the act protect any but real dissenters. *ibid.*
- 6 Dissenting teachers tolerated *ibid.* f. 2
- 7 May qualify, pending prosecution. 48
- 8 Those who scruple to take the oaths are within the protection, provided they subscribe the declaration. *ibid.* f. 3
- 9 Spiritual courts cannot proceed against persons maimed in a licensed conventicle. 40. f. 4
- 10 Dissenting ministers or teachers who scruple to take the oaths are to subscribe the declaration directed by 19 Geo. 3. c. 44 *ibid.*
- 11 But this does not intitle them to hold the mastership of any royal college, &c. *ibid.*
- 12 How far the law favours dissenters and how the act of toleration is to be construed. 49
- S f 3

DISORDERLY

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DISORDERLY HOUSES.—*Vide*
Barody house. Debating. Lord's Day.

DISORDERLY PERSONS.—*Vide*
Vagrants.

DITCHES.—*Vide Highways.*

- 1 By the common law, the tenant of the lands adjoining to highways are bound to scower their ditches. *Pa. e* 368 f. 5
- 2 But not those who have lands next adjoining to such lands, unless by prescription. 405 f. 52
- 3 By 13 Geo. 3. c. 78. f. 30. all occupiers of lands are liable to be rated toward the making tunnels for scowring of ditches. 379 f. 20
- 4 Surveyors of the highways may order all nuisances in, or obstructions of ditches, &c. to be removed, on personal notice thereof to the occupier, and if not removed within twenty days, the surveyor shall remove them at the expence of the occupier who shall pay one penny a foot, &c. 395
- 5 The possessors of land next adjoining every highway, shall make ditches, &c. of a sufficient depth and breadth, for keeping the highways dry, and shall scour and cleanse the same, and make sufficient trunks, tunnels, &c. on pain of 10s. after ten days notice by the surveyor. 406 f. 55
- 6 The surveyor, by order of one justice, shall make new ditches and drains in and through the adjoining lands, or any other lands if necessary; and to keep such ditches, &c. scoured, &c. the surveyor, with proper workmen, may go upon the lands. 407
- 7 Surveyors shall make proper trunks, &c. over such ditches, for the convenient use of the lands; keep the same in repair; and make satisfaction to the owner for the damage sustained thereby. f. 57
- 8 If any person, in making, cleansing, or scowring the ditches, shall permit the soil thrown out, to obstruct or prejudice the highway, for five days after notice by the surveyor. he shall forfeit 10s. 408 f. 62

- 9 If any person shall encroach on the highway, by making any ditch within 15 feet from the centre. &c. &c. he shall forfeit 40s. and the same shall be filled up again at the expence of the offender. *Pa. e* 409
- 10 How far the powers given by the highway acts relating to ditches, &c. may be extended to turnpike roads. 441

D I V O R C E.

- 1 Persons divorced *a vinculo matrimonii*, or even *a mensa et thoro causa adulteri vel fornicationis* may marry again without incurring the penalties of bigamy by 1 Jac. 1. c. 11. 174 f. 5
- 2 And for this purpose the word *separatus* without the word *divortium* in the sentence will be sufficient. *ibid.*

DIVINE SERVICE.—*Vide Church.*
Absence.

D O G S.

- 1 It is no felony at common law to steal dogs, because they are things of a base nature. 143
- 2 But by 10 Geo. 3. c. 18. whoever shall steal dogs from the owner, or from any person intrusted with them by him, or shall knowingly buy, sell, receive, harbour, or detain stolen dogs, or shall have the skin thereof in his custody is liable to certain pecuniary penalties, &c. *ibid.*
- 3 *Quere.* Whether the stealing a bitch is within the penalties of this act. (N) 3
- 4 The particular sort of dog stolen must be described. *ibid.*

D O O R S.

- 1 The constable may break open doors to suppress an affray, and if the offenders fly and take refuge in a house, he may break open the doors to apprehend them. 269 f. 16

DOVE

A TABLE OF PRINCIPAL MATTERS.

DOVE COTE.

- 1 A dove cote, either erected by the lord or his tenant, is not a common nuisance. *Page 362 f. 8*
- 2 It may be justified by prescription. *ibid.*
- 3 It is demandable in a præcipe before any land whatsoever which is not built upon. *ibid.*
- 4 The owner of a dove cote may justify taking another's hawk flying at his pigeons. *ibid.*
- 5 But a tenant is liable to an action on the case for building a dove cote without licence from the lord. *ibid.*
- 6 But by 1 Jac. 1. c. 27. and 2 Geo. 3. c. 29. the keeping pigeons as therein prohibited, is a nuisance. *ibid.*

DOWER.

- 1 The wife of a *felo de se* is not barred from her dower by the felony of her husband. *103 f. 8*
- 2 A title to dower from a house of which a wife is trustee, is not a sufficient possession to avoid the guilt of arson if she set fire to it during the term of her lease. *166(N)*
- 3 A statute which saves corruption of blood; or land, to the heir, impliedly saves the wife's dower. *169 f. 5*

DROVERS.—*Vide Salesman.* *Cattle.*

- 1 By 29 Car. 2. c. 7. no drover, horse courier, waggoner, butcher, or higgler, shall travel, or come to their inn on the Lord's day, on pain of 20s. *11 f. 3*

DRUNKENESS.

- 1 A voluntary drunkard shall be punished for the crimes committed during his intoxication, as much as if he were sober. *3 f. 6*

- 2 By 4 Jac. 1. c. 5. the offence of drunkenness incurs a penalty of 5s. to the poor. *Page 13 f. 5*
- 3 By 22 Geo. 2. c. 33. seamen shall be punished for this offence in the discretion of a court-martial. *ibid.*
- 4 A publican permitting drunkenness in his house, shall forfeit 10s. *466 f. 43*
- 5 By 21 Jac. 1. c. 7. drunkards shall forfeit 5s. *467, 468*
- 6 The punishment inflicted on repeated tippling. *468*

DUCKING STOOL.

- 1 A common scold is punishable by the ducking stool. *365*

DUEL.—*Vide Challenge.* *Affray.*

- 1 If two persons meet and fight in cool blood upon a precedent quarrel, and one is killed, the other is guilty of murder. *122 f. 21*
- 2 And it is no excuse that the defeated struck first; or that the killer had often declined to meet him; and was only prevailed upon by his importunity; or that he only intended to vindicate his reputation; or that he only meant to disarm his adversary. *ibid.*
- 3 So, if two quarrel and appoint a distant time to fight, as from night to morning, or from morning to the afternoon, it may reasonably be presumed the blood was cooled in the interval. *f. 22*
- 4 And the same construction shall be made upon a sudden quarrel, if it appear that either of the parties was master of his temper at the time.
- 5 And not only the principals, but the second to the killer also is guilty of murder. *124 f. 31*
- 6 But it seems that the second to the person killed should yet be involved in his guilt. *ibid.*
- 7 And barely to challenge to a duel, by letters, words, or provoking language, *or*

A TABLE OF PRINCIPAL MATTERS.

- or to be the messenger thereof, is a very high misdemeanor. *Page 266 f. 3*
- 8 By 9 Ann. c. 14. f. 8, to challenge or provoke another to fight, on account of money won at play, is forfeiture of goods and imprisonment 2 years. 266

D U R E S S.

- 1 In what cases it will exempt from the guilt of treason. 54, f. 24(N)3

DUTIES.—*Vide Smuggling. Permits.*

E

E A R.

- 1 BY 5 & 6 Edw. 6. c. 4. to strike with a weapon in a church or churchyard, is loss of an ear, &c. 271
- 2 By 2 and 3 Edw. 6. c. 15. against combinations among victuallers, &c. the offender shall lose an ear, &c. &c. 481
- 3 Cutting off a man's ear is not mayhem by the common law. 175 f. 2
- 4 But by 22 and 23. Car. 2. c. 1. if done with intent to maim or disfigure the person, it is felony without clergy. 176 f. 4
- 5 By 37 Hen. 8. c. 6. if a man shall maliciously cut off the ear of another, he shall forfeit treble damages and 10*l.* *ibid.* f. 7.
- 6 By 5 Eliz. c. 14. against forgery of deeds relating to real estates, the offender shall have both his ears cut off, and for any forgery relating to a term of years, &c. he shall lose one ear, &c. 339, 340

E A S E M E N T.

- 1 An easement, as a right or way or the like, is not that sort of possession

which is within the statutes against forcible entries. *Page 282*

E A V E S D R O P P E R S.

- 1 Eaves droppers are such as listen under windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales to the common nuisance, are presentable at the leet, indictable at sessions, and punishable by fine and finding surety for good behaviour. 262 f. 4

E C C L E S I A S T I C A L.

- 1 A force done to ecclesiastical possessions, as churches, vicarage houses, &c. is as much within the statutes against forcible entries, as if it were done to any temporal inheritance. 281 f. 31
- 2 All persons ecclesiastical or temporal, are liable to punishment for high treason. 50 f. 4
- 3 The jurisdiction of the ecclesiastical court is saved by the statute against ripling. 468 f. 49
- 4 So also it is saved by 5 Eliz. c. 9. against perjury and subornation. 327 f. 15
- 5 The 1 Eliz. c. 2. against ministers not using the common prayer, also serves the jurisdiction of the ecclesiastical court. 14 f. 4
- 6 The 5 Eliz. c. 14. against forging deeds, wills, &c. shall not extend to any officers of the ecclesiastical court, who shall officially set his name to any such writing, &c. 341
- 7 The offices of chancellor, register, and commissary in ecclesiastical courts are within 12 Rich. 2. c. 2. against buying offices. 315 f. 4
- 8 How far suits in the ecclesiastical courts are within the 16 Rich. 2. c. 5. which puts all those out of the king's protection who shall sue out process in the court of Rome or elsewhere. 80 f. 18, 19.

A TABLE OF PRINCIPAL MATTERS.

9 In proceedings in the ecclesiastical court against hereticks, the appeal is to higher spiritual courts, and not to those of common law for a prohibition. *Page 7 f. 9*

10 In what cases the ecclesiastical courts may be prohibited from proceeding on 1 Eliz. c. 2. for absence from church. *19 f. 1*

11 The jurisdiction of the ecclesiastical court over the offence of heresy. *6, 7*

12 A suit in the ecclesiastical court is not within the statutes against maintenance. *545 f. 46*

13 How far an affirmative statute saving the jurisdiction of the ecclesiastical courts, leaves them open to inflict spiritual penalties on offenders. *14 f. 4*

EDUCATION.—*Schools.*

1 By 1 Jac. 1. c. 4. to send any child abroad, for the purpose of being educated in the Popish religion, incurs a penalty of 100 *l.* *42 f. 1*

2 And the persons so sent shall be disabled to inherit, &c. *ibid.*

3 By 3 Jac. 1. c. 5. if the children of any English subject not being mariners, &c. &c. shall be sent abroad to prevent their good education in England, they shall be disabled, &c. unless they take the oath of obedience, &c. and the person sending such child shall forfeit 100 *l.* *43*

4 By 3 Car. 1. c. 2. if any person shall go abroad to be strengthened in the Popish religion, they shall forfeit all goods, hereditaments, &c. &c. *43 f. 3*

EFFUGAVIT.

1 In what case necessary in an indictment for larceny. *134. f. 2*

E G G S.

1 Larceny may be committed by taking the eggs of any swans *marked and pinioned.* *144 f. 27*

2 But by 1 Hen. 7. c. 17. a lesser punishment is appointed for this offence, *ibid.*

3 And there is no doubt but that the taking the eggs of ducks, hens, &c. is felony. *Page 144. f. 28*

E G Y P T I A N S.

1 Of the age of 13 years remaining in England one month forfeit 40 *l.* *198*

2 Persons pretending to be Egyptians deemed rogues and vagabonds. *ibid. c. 54*

ELECTION.—*Vide Bribery.*

1 If a statute ordain a forfeiture, or imprisonment, at the election of the party, *quere* if the party die within the time limited for the payment, whether the forfeiture be discharged. *14 f. 6*

2 It is in the election of the crown to either proceed upon the old statutes which make purchasing *bulis* from Rome high treason, or upon 13 Eliz. c. 2. which reduced the offence to *præmunire.* *79 f. 13*

3 So also government may proceed against *nonjurors* either on the statutes of *præmunire* or on the modern and milder statutes. *96 f. 5*

4 By 13 Car. 2. c. 1. members of corporations must have received the sacrament within one year before their election. *15*

5 But by 5 Geo. 1. c. 6. such election is good notwithstanding the omission of receiving the sacrament. *15, 16*

6 By 11 Geo. 1. *the oaths* shall be taken before the person who presides at the election of corporate officers. *16*

7 To refuse to elect the person nominated by the king to a bishoprick is *præmunire.* *80 f. 22*

8 If either of the universities neglect to elect a member in the place of one disqualified by not taking the oath, &c. the king may appoint. *98 f. 9*

9 In what manner surveyors of the highways shall be elected. *389*

ELOPEMENT.

A TABLE OF PRINCIPAL MATTERS.

ELOPEMENT.

- 1 By 4 and 5 Phil. and Mary, c. 8. whoever above the age of 14 shall induce a woman child of 16 years unmarried to elope from and against the consent of her guardians, shall suffer two years imprisonment and fine at discretion. *Page 172 f. 10*
- 2 And if the offender deflower or marry her, five years imprisonment and fine as before. *ibid.*
- 3 And if any female above 12 shall consent to unlawful matrimony, she shall forfeit all her lands to the next of kin during her life. *172, 173*
- 4 This forfeiture extends as well to the infant who consents, as to the husband who takes. *173 (N) 2*
- 5 The marriage must be *clandestine* and to the disparagement of the heirs. *ibid.*
- 6 If the guardian once consents, he cannot retract. *ibid.*
- 7 A bastard under the care of her putative father, is within this act. *ibid.*
- 8 The offence is within the jurisdiction of the King's Bench. *ibid.*
- 9 And the court will grant an information against the offender. *ibid.*

E L M.—*Vide Tres.*

EMBEZZLEMENT.

- 1 By 31 Eliz. c. 4. if any person having the charge of the king's stores, shall embezzle the same to the value of 20 s. he shall be guilty of felony. *75 f. 18*
- 2 By 22 Car. 2. c. 5. the benefit of clergy is taken from this offence. *ibid.* (N)
- By 7 Jac. 1. c. 7. if any manufacturer of wool, &c. shall embezzle any wool or yarn delivered to him to work, he shall be whipped, &c. &c. *139 f. 17*
- By 17 Geo. 3. c. 56. how servants in the hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mair, silk &c. dying manufactures,

embezzling the materials entrusted to their care shall be punished. *Page*

140

- 5 By 3 & 4 W. & M. c. 9. if any person shall take away the furniture of their lodging, with intent to embezzle it, they shall suffer as in case of felony. *137 f. 10*
- 6 By 21 Hen. 8. c. 7. if any servant shall embezzle his master's jewels, money, goods, &c. intrusted to his care, to the amount of 40 s. he shall be guilty of felony. (*Vide Larceny.*) *138 f. 11*
- 7 By 15 Geo. 2. c. 13. if any officer of the bank shall embezzle any part of the property intrusted to his care, he shall suffer without benefit of clergy. *139, 140*
- 8 By 5 Geo. 3. c. 25. servants of the post offices embezzling any letter or packet, or bag of letters, containing any security for money, shall suffer death without clergy. *140*
- 9 For the offence of embezzling naval stores. (*Vide Naval Stores.*) *562*
- 10 What punishment shall be inflicted for embezzling of records. (*Vide Records.*) *177 c. 45*

EMBRACERY.

- 1 Every corrupt attempt to influence a jury in their verdict, although no verdict is given, is embracery. *548 c. 85*
- 2 Even a stranger shall not desire a juror to appear and act conscientiously. *549*
- 3 Giving money to a juror after verdict, favours of this offence. *f. 3*
- 4 But not if it be their usual allowance. *ibid.*
- 5 Giving money to another to distribute among them, is of the nature of embracery, although not distributed. *f. 4*
- 6 Nor shall even a juror practise on his companions. *ibid.*
- 7 Procuring to be a juror for partial purposes, is criminal. *ibid.*
- 8 It is altogether unlawful for any person to tamper with a jury. *f. 5*
- 9 But whoever may justify any other act of maintenance may desire a juror to appear. *c. 6*

10 The

A TABLE OF PRINCIPAL MATTERS.

- 10 The offender is liable to either an indictment or an action. *Page 550 f. 7*
- 11 And if the party prejudiced is ignorant of the embracery so as to prevent his challenging the juror, it is a good cause to set aside the verdict. *ibid.*
- 12 By 5 Ed. 3. c. 10. the juror corrupted shall be disqualified and imprisoned, and the court are empowered to enquire of the offence. *f. 8*
- 13 By 34 Ed. 3. c. 8. the parties who shall sue embraced jurors, shall be heard immediately by the court, and the juror put to plead *maintenant, &c.* *f. 9*
- 14 By 38 Ed. 3. c. 12. every juror or embraceror attempted upon the above statute, shall pay *ten times as much* as he receives; half to him that will sue, &c. or be imprisoned for one year. *551 f. 10*
- 15 What may be pleaded in *bar*, or *abatement*, to a *decies tantum*. *f. 11*
- 16 In *decies tantum* it must be shewn that the money was given to the juror. *f. 12*
- 17 The plaintiff must shew how much the juror received. *f. 13*
- 18 Money given after the verdict, is not within the act, unless in consequence of previous agreement. *f. 14*
- 19 And it is immaterial whether a verdict was given or not. *f. 15*
- 20 All the jurors or embracerors may be joined in one action, but they ought to plead severally. *552 f. 16*
- 21 They ought specially to deny taking the money. *f. 17*
- 22 The prosecutor's half of the fine shall be paid before the king's. *f. 18*
- 23 A husband alone may bring *decies tantum* for embracery, where he and his wife were parties. *f. 19*
- 24 The difference between money given for land, and the real worth of the land shall be considered as money received. *f. 20*
- 25 This action may be barred by the king's release, but not by the parties. *f. 21*
- 26 How the party may declare in *decies tantum*. *ibid.*
- 27 Outlawry does not lie in this action. *f. 22*
- 28 What process does lie. *ibid.*
- 29 No *capias* into a foreign county lies against the jurors. *Page 552 f. 22*

EMISSION.

- 1 In sodomy, there must be evidence of emission as well as penetration; out emission is *prima facie* evidence of penetration. *9, 10*
- 2 No assault, with intent to ravish, can amount to a rape, unless it proceed to some degree of penetration, and also of emission; but evidence of emission is *prima facie* evidence of penetration. *169*

ENDS OF BRIDGES.

- 1 How the roads at the ends of bridges shall be repaired. *448, 451*

ENEMY.—*Vide Treason.*

- 1 No persons can be guilty of an affray by assembling and arming, in order to oppose enemies. *268*
- 2 If a man be adherent to the king's enemies in his realm, he is guilty of high treason. *50 f. 3*
- 3 Alien enemies, invading the kingdom in a hostile manner, are to be dealt with by martial law. *51 f. 6*
- 4 What shall be said to be an adherence to the king's enemies. *55 f. 28*
- 5 How far intercepted letters to the enemy are proofs of high treason. *56 (N) 7*
- 6 By 22 Geo. 2. c. 33. to destroy any ship, &c. not appertaining to the enemy, &c. is death, on conviction by a court martial. *76*

ENGLISH COUNTY.

- 1 Salop is considered as the next adjoining English county to Wales. *220, 221*

ENGINES.—*Vide High Treason.*

- 1 By 8 & 9 Will. 3. c. 36. whoever shall make or mend any engine, not
of

A TABLE OF PRINCIPAL MATTERS.

- of common use in any trade, but contrived for marking of money round the edges with letters, &c. Or any cutting engine, for cutting round blanks, by force of a screw, out of flatted bars, &c, shall be guilty of high treason. *Page 64*
- 2 If any such engine shall be elsewhere found than in the custody of the king's minters, they may be seized, carried before a justice, and destroyed. 65
- 3 By 9 Geo. 3. c. 29. to burn, destroy, or damage, any engine, for drawing water from collieries, is transportation for seven years. 238 f. 4
- 4 How, and by what authority, weighing engines, for turnpike roads, shall be erected. 428
- 8 Butchers selling unwholesome meat how punished. *Page 480*
- 9 Restrained from killing beasts in walled towns. *ibid.*
- 10 When calves shall be killed. *ibid.*
- 11 Aliens in amity may sell the victuals they import. f. 7
- 12 Penalty for preventing them. *ibid.*
- 13 By 25 Hen. 8. c. 2. the chancellor and other great officers of state may, upon complaint of their being in-
hanced, fix and regulate the price of victuals. 481
- 14 By 2 & 3 Edw. 6. c. 15. none shall conspire not to sell victuals, or not do work but at certain prices; and those who shall so conspire to leave work unfinished, or only to do certain work in a day; or, at certain hours, &c. they shall forfeit. &c. f. 10
- 15 And if such conspiracy shall be formed by the major part of any of the companies mentioned, their incorporation shall be thereby dissolved. *ibid.*
- 16 By 2 Geo. 3. c. 14. no victualler or publican shall be sued for advancing the price of malt liquors in a reasonable degree. 482
- 17 No brewer shall mix strong beer or worts with small beer or small worts, on pain of 50*l.* *ibid.*
- 18 The statutes against forestalling, ingrossing and regrating repealed. f. 11
- 19 Whoever shall buy victuals in their way to market, is a forestaller. f. 13
- 20 Whoever shall buy victuals and sell them again in the same market, or within 4 miles thereof is a regrator. f. 14
- 21 Whoever shall get into his hands any victual, grown or produced by another is an ingrosser. f. 15
- 22 Salt is comprehended under the word victuals. f. 16
- 23 But hops, malt, apples, pears, &c. are not. f. 17
- 24 Nor can a person ingross by buying corn in order to make starch of it; or to make malt, or meal. f. 18
- 25 In what manner the indictment or information should be framed. f. 19, 20, 22
- 26 The punishment by statute, for this offence. f. 21

ENGLESHCHIRE.

- 1 Anciently murder signified privately killing; therefore CANUTE passed a law for the preservation of his *Danes*, that the town where the fact happened, should be *amerced*, unless it was proved that the person slain was an *Englishman*, and this proof was called *English-bire*. 114 f. 22. 117 f. 1
- 2 This law abolished by 14 Ed. 3. c. 4. *ibid.* f. 2

ENQUEST.—*vide Inquisition. Armour.*

ENGROSSING.

- 1 Is enhancing, by any means, the prices of merchandize and victuals. 479. f. 1 and 2
- 2 Importers of merchandize may sell in gross; but no persons can buy and sell in gross within the realm. f. 3
- 3 A bare intent to sell an engrossed commodity at an unreasonable price is indictable at common law whether any part be sold or not. f. 3
- 4 Corn cannot be sold in the sheaf. f. 4
- 5 How this offence was anciently punished. f. 5
- 6 At this day offenders are liable to fine and imprisonment. 480
- 7 By 23 Edw. 3. c. 6. all dealers in victuals shall sell the same for a reasonable price on pain of double value. 480 f. 6
- 8 The punishment by statute, for this offence. f. 21

ENLIST.

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ENLISTING.—*Vide Soldier.*

- 1 By 9 Geo. 2. c. 30. whoever shall enlist himself, or procure another to enlist, or hire another with intent to cause him to enlist, or procure another to embark in order to be enlisted to serve any foreign prince without licence, &c. although no enlisting money be paid, is felony without clergy unless within 14 days the offender discover his seducer. *Page 74 f. 16*
- 2 By 29 Geo. 2. c. 17. to enlist into the military service of the French king as an officer without licence, is felony without clergy. *75*
- 3 To enlist as a commission officer into the Scotch brigade in the Dutch service is a forfeiture of 500 l. *ibid.*

ENTICING.—*Vide Artificers, — Soldiers.*

ENTERTAINMENT. — *Plays. — Lord's Day.*

ENTRY.—*Forcible Entry. Burglary.*

- 1 The words *fregit & intravit* are both essentially necessary in an indictment for burglary; and both must be satisfied. *160*
- 2 Any the least *entry*, either with the whole or with but part of the body, or with any instrument or weapon will satisfy the word *intravit*; as if one do but put his foot over the threshold, or his hand, or a hook or a pistol within the window. *161*
- 3 But the *entry* made, or *thing* introduced, must be for the purpose of committing felony. *162*
- 4 Therefore an *entry* made with an instrument for the purpose of breaking, and not for the felonious purpose, is not such an *entry* as will satisfy the word *intravit*. *ibid. (N) 1*
- 5 An actual *entry* in all cases is not necessary. *f. 8*

- 6 An *entry* obtained by fraud or collusion is sufficient. *Page f. 9*
- 7 What acts of violence shall constitute a *forcible entry* within the statutes of forcible entry and detainer. 276 to 280
- 8 The manner in which the copy right of authors must be entered at Stationer's Hall, in order to protect their property in the copy. *476*

ENTAIL.

- 1 The forfeiture of all lands and tenements by 16 Rich. 2. c. 5. *for praemunire*, extends not to land entailed after the death of the offender. *85. f. 48*

EQUITY.

- 1 Whoever hath an equitable interest in lands or goods may lawfully maintain another in an action relating thereto. *539. f. 17*

ERASURE.

- 1 Erasing the name of one man out of a patent, and putting in that of another, or any artificial removing of the true writing altogether new, &c. from any instrument to which the seal is affixed, is not within the statute of treasons as counterfeiting the king's great and privy seal. *61. f. 52*
- 2 By 11 Geo. 1. c. 9. to erase or alter a bank note or any indorsement, &c. thereon, is felony without clergy. *205*
- 3 And to obliterate the red mark usually made on payment, is an erasure. *ibid.*
- 4 It is not forgery under the 5 Eliz. to erase the word *libris* from a bond and insert *maris* instead thereof. *337. f. 4*

ERECTION.—*Vide Nuisance.*

ERROR.

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E R R O R.

- 1 What species of error may properly be called heretical. *Page 6. f. 2*
- 2 A writ of error cannot be brought on any record which is not a judgment. *24. f. 23*
- 3 Error, tending to the king's prejudice may be assigned on a conviction for not coming to church; but no other error. *25. f. 29*

ESTREAT.—*Vide Recognizance.*

ESCAPE.—*Vide Homicide. Execution. Quarantine.*

- 1 An officer may justify homicide of a prisoner who resists, being retaken upon an escape without giving back at all. *107. f. 17*
- 2 Of homicide where the direct design is to escape from an arrest. *129. f. 55*
- 3 If a bankrupt is likely to escape, he may be committed. *204. (N) 1*
- 4 By 26 Geo. 2. c. 26. if any person shall escape out of the house, lazaret, or place appointed for the performance of *quarantine*, he shall suffer death without clergy. *242. f. 5*

ETCHING.—*Vide Forgery.*

- 1 By 13 Geo. 3. c. 79. to etch, &c. in mezzotinto, upon any material, any bill containing the words BANK OF ENGLAND, or BANK POST BILL, &c. is imprisonment for six months. *206*
- 2 By 8 Geo. 2. c. 13. whoever shall etch, &c. in mezzotinto or chiaro oscuro any original print, shall have the sole right of printing and reprinting the same, &c. *477*
- 3 By 23 Geo. 3. c. 30. to etch, &c. the words EXCISE OFFICE in any paper for granting permits, is felony without clergy. *565*

E V A S I O N.

- 1 No woman, by using fraudulently, the process of the law, in order to obtain the goods of another, shall excuse the party from the guilt of larceny. *Page 136. f. 8*
- 2 Nor shall the evasion of having been entrusted with the goods, avail, if they were originally obtained with a felonious intention. *ibid. f. 10*
- 3 Nor will the obtaining a felonious entrance into a house upon pretence of business evade the guilt of burglary. *161. f. 5*
- 4 So also, in libels, no artful method of appearing to conceal the intended defamation, by initial letters, &c. shall evade the punishment. *353. f. 5*
- 5 So also if *A.* tell *B.* that he will give him a pot of ale to strike him; and thereupon *A.* kills *B.*—this shall not evade the guilt of murder; if it appears to have been designed. *123. f. 24*
- 6 In like manner if on a challenge *A.* refuses to meet *B.* but tells him he shall go next day to such a place, and they there meet and fight, this shall not evade the law, if death ensues. *f. 25*

EVIDENCE.—*Vide Witnesses.*

- 1 Opening the evidence to the jury, in favour of one of the parties, is said to be a species of maintenance. *536 f. 6*
- 2 In *se defendendo*, and manslaughter, the special matter shall be given in evidence on the general issue. *105 f. 3*
- 3 So also in homicide by misadventure. *115*
- 4 A borrower shall not be admitted an evidence against an usurer, until he has paid off the whole debt. *533 f. 27*
- 5 But the borrower is a good evidence to prove the repayment of the money, and

A TABLE OF PRINCIPAL MATTERS.

- and also the usurious contract. Page 533 (N)
- 6 So he may give evidence, though the money is not repaid, if the question neither affects the debt nor avoids the contract. *ibid.*
- 7 Where the interest of a witness is doubtful, the objection shall only go to the credit of his evidence, and not to his competency. *ibid.*
- 8 Entrance for goods will not support an information for usury, for the loan of money. 534
- 9 To dissuade, or endeavour to dissuade, a person from giving evidence against a person indicted, is a contempt of court. 90 f. 15
- 10 Refusing to give evidence before the grand jury, concerning a crime, is a contempt of the king's prerogative, for which the court may impose an immediate fine. 91 f. 4
- 11 What shall be evidence of a person's being a trustee for a turnpike road. 424
- 12 Upon what evidence convictions for offences against the highway and turnpike acts, shall be made. 440
- 13 How far the exciseman's book shall be evidence of a person being an alehouse-keeper. 458
- 4 How licences shall be granted within the limits of the excise office in London. Page 462
- 5 Commissioners of the excise empowered to mitigate penalties. 463

EXCHANGE.—*Vide Bills.*

EXCUSE.

EVIL.—*Infancy. Discretion.*

- 1 The period at which the human mind is presumed capable of distinguishing between good and evil. 1 (N) 1

EVIL SPIRITS.—*Witchcraft. Charmers. Sorcery.*

EXCISE.

- 1 A man may be bound to good behaviour for accusing justices of ignorance of the excise laws. 262 (N) 1
- 2 The exciseman's book shall be proof of a person's being an alehouse keeper. 458
- 3 How retailers of excisable liquors shall be licensed. 461, &c.

- 1 In homicide it is no excuse for the slayer that the deceased might have recovered if he had not neglected to take care of himself. 119 f. 10
- 2 If a person be sick for part of the time contained in an information, on 23 Eliz. c. 1. for 20/. for every month's absence from church, he shall not be excused on account thereof, if it be proved he was a recusant. 21 f. 10
- 3 A person in holy orders is not thereby excused from the duties imposed by the highway act. 377 f. 15
- 4 Making a winding passage through logs laid on a highway, will not excuse from the penalty of the nuisance.
- 5 It is no excuse from the guilt of defamation, that the person only read the libel in the jest. 356 f. 14
- 6 In what cases justices are excused for not executing the statute 13 Hen. 4. c. 7. against rioters. 307
- 7 The stat. 23 Eliz. c. 1. inflicting 20/. for every month's absence from church, does not excuse the offender from the forfeiture of 12 d. given by 1 Eliz. c. 2. for the absence of one Sunday. 20 f. 7.
- 8 All excuses from the charge of repairing decayed bridges, by reason of privileges of exemption, whether derived from charter or act of parliament, are taken away, 22 Hen. 8. c. 5. 449 f. 18

EXCHEQUER.

- 1 On 2 Ed. 3. against riding armed, the justices ought to record their proceedings,

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- ceedings, and *where he proceeds ex officio* certify the same into the *Exchequer*. Page 267
- 2 How far the statute of monopolies extends to the Exchequer. 473
- 14 And though he wound the assailant in retreating, yet if he give him no mortal wound, till his further retreat is stopped, it is only *se defendendo*. Page 113 f. 15

EXCUSABLE HOMICIDE.

- 1 Excusable homicide is either *per infortunium* or *se defendendo*. 111
- 2 *PER INFORTUNIUM* is by misadventure where a man, in doing a lawful act, without an injurious intention, happens to kill another. f. 1
- 3 As where the head of a hatchet flies off and kills. f. 2
- 4 Or where a horse whipped by a third person, runs over a child. f. 3
- 5 Or where a workman, *after proper notice*, flings timber from a house, &c. f. 4
- 6 Or where death ensues from *moderate* correction, &c. f. 5
- 7 Or where an arrow glances and happens to kill. 112
- 8 Or where death happens in playing at foot ball. f. 7
- 9 Or where one kills another in fighting at *barriers*, by the king's command. f. 8
- 10 Or where the gun of a stranger, attending a game keeper, who is warding off poachers from the ground of a third person, and the gun accidentally goes off and kills one of the poachers, for the duty of the gamekeeper will authorize the trespass of the stranger. ibid.
- 11 *SE DEFENDENDO* is where one who has no other possible means of saving his life from the force of a sudden attack, kills the person by whom he is reduced to such an inevitable necessity. 113 f. 13
- 12 And he who, on an assault, retreats as far as safety will permit, and then kills his assailant, is judged to act upon unavoidable necessity. f. 14
- 13 So also, if his situation be such, either from the violence of the assault, or from the nature of the place, that he cannot retreat without endangering his life. ibid.
- 15 An officer resisted in the execution of his duty, and a private person feloniously attacked on the highway, may justify the killing without giving back at all. f. 16
- 16 And it is said, tho' even he who gives another the first blow, *without malice*, and afterwards do what he can to avoid killing him, is not guilty of felony,—*Sed quare*. f. 17
- 17 Homicide *per infortunium* and *se defendendo*, are not felonies; were always bailable by the *King's Bench*, &c. and never punishable with the loss of life. 114
- 18 They are not bailable by *justices of peace*, but the offenders must be committed till the next assizes. f. 23
- 19 Anciently they might have been *mainprized* by the writ *de odio et atia*, but this is obsolete. 114, 115
- 20 These offences cannot be justified by special pleading, but the special matter may be given in evidence on *Not Guilty*. f. 25
- 21 If the offender be acquitted of the indictment, or found not guilty on a special verdict, he shall be discharged upon bail, and forfeit his goods. *ibid.*
- 22 But that by removing the record by *certiorari*, into Chancery, he shall be pardoned of course, without waiting for the king's warrant. *ibid.*

EXCOMMUNICATION.

- 1 By the common law, an excommunicated heretic may be imprisoned by the writ *excommunicato capiendo*. 7. f.
- 2 By 5 & 6 Edw. 6. c. 4. whoever shall smite, or lay violent hands upon another in a church or church yard shall *ipso facto* be deemed excommunicate. 271. f. 25
- 3 And whoever shall maliciously strike another with any weapon in a church or church yard, or draw the same with

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intend to strike, shall, on con-
as the statute directs, have one
ears cut off, and stand *ipso fac-*
communicated. Page 272 f. 26
withstanding the words *ipso*
there must be either a precedent
tion at law, transmitted to the
try, or else the excommunica-
must be declared in the spiritual
on proof of the offence there. 272
Jac. 1. c. 1. every popish re-
convict shall stand disabled, &c.
sons excommunicated, to all in-
and purposes. 32 f. 1
hey cannot be apprehended up-
communicate *capiendo*. 33 f. 6
munication must always ap-
judicially, otherwise there can
absolution. 272

EXECUTION.

ie conviction of an infant, with-
years of discretion, for a capi-
tence, the judges will, in dis-
n, respite the execution in order
cure a pardon. 3 f. 8
Common Pleas, on an appeal of
, or justices of the peace on an
ment of treason, award execu-
and the execution is accord-
g, the judges who award, and
icer who executes, are guilty
my. 105 f. 5
trespass, if the justices of peace
n for felony, and award exe-
, the justice only, and not the
, is guilty. 106
tion must be done by the law-
ficer. f. 7
private person do execution, or
proper officer himself do it
ut lawful command, it is felony.
f. 9
execution must be pursuant of,
arranted by the judgment;
ore if a sheriff behead a man
that is no part of the sentence,
guilty of felony. f. 10
sing cannot vary the execution,
to aggravate the punishment.
(N) 1

L. L.

- 8 How homicide, in execution of pub-
lic justice, is justified. Page 105
- 9 If a convict becomes *non compos* after
conviction, he shall not be executed.
2 f. 3

EXEMPTION.

- 1 Persons in holy orders are not exempt-
ed from contributing to the repair of
the highways, in respect of their spi-
ritual possessions.
- 2 Carriages employed in husbandry are
exempted from being weighed at the
engines on turnpike roads. 430 f. 21
- 3 What other kind of carriages are ex-
empted from the payment of tolls on
turnpike roads. 434, 435

EXERCISE.

- 1 To exercise the jurisdiction of a suf-
fragan, without the appointment of
the bishop of the diocese, is *præmu-
nire*. 80 f. 21

EXERCISING a TRADE.—*Vide Ap-
prenticeship. Trade.*

EXILE.—*Vide Transportation.*

EX OFFICIO—*Affrays. Riding
Armed.*

EXPORTATION.—*Vide Smuggling.*

- 1 By some old statutes the exportation of
wool was made felony. 195
- 2 By 7 & 8 Will. 3. c. 28. it is redu-
ced to a misdemeanour. *ibid.*
- 3 By 8 Eliz. c. 3. no person shall ex-
port rams, sheep, or lambs, alive,
on pain, their aids, &c. of forfeit-
ure of goods, imprisonment for a
year, loss of land, &c. for the first
offence. For the second the offender
shall be guilty of felony. f. 2

T t

4 B 1

A TABLE OF PRINCIPAL MATTERS.

4. By 12 Car. 2. c. 32. whoever shall export any sheep or wool, or load the same, &c. for such purpose, shall forfeit the goods, and 20*s.* for every sheep, and 3*s.* for every pound of wool. Page 195 f. 3
- 5 How the owners of the ship, the masters and mariners, and the merchant, shall be punished. ibid.
- 6 By 9 & 10 Will. 3. c. 40. prosecutions may be commenced by the informed within one, and by the crown within three years. 195, 196
- 7 By 7 & 8 Will. 3. c. 28. whoever shall aid in the exportation of wool shall suffer three years imprisonment, and pay treble the value, the inhabitants, &c. are liable to, &c. 196 f. 4
- 8 By 4 Geo. 1. c. 11. whoever shall be in prison for the exportation of wool, or for aiding therein, and shall refuse to plead to the prosecution within one term, judgment shall be entered; and in case the penalty be not paid in three months, the offender shall be transported. f. 5
- 9 By 12 Geo. 2. c. 21. whoever shall bribe, or offer, or promise so to do, to any revenue officer, to connive at the transportation or concealment of wool, shall forfeit 300*l.* f. 6
- 10 And if any officer, or his assistant, shall be obstructed in seizing any wool, the offenders, their aiders, or any other person, *being armed and disguised*; or who shall attempt to rescue any wool, seized by such officers, shall be transported for seven years. f. 6
- 11 By 19 Geo. 2. c. 34. if any persons armed, to the number of three, shall be assembled to assist in the illegal exportation of wool, or shall rescue, &c. or if any person shall have his face disguised, when passing with such goods, or shall obstruct the seizing, &c. he shall be guilty of felony without clergy. 196, 197
- 12 Formerly the exportation of *all coin and bullion* was prohibited. 72 f. 6
- 13 By 15 Car. 2. c. 7. any person may export any *foreign coin* or bullion. ibid.
- 14 But by 6 & 7 Will. 3. c. 17. whoever shall make ingots of silver, in imitation of the Spanish, shall forfeit 500*l.* Page 72 f. 7
- 15 And no person shall export any molten silver, unless stamped at *Goldsmith's Hall*, under a certificate, that oath was made by the owner and one witness, that the same is lawful silver, and that no part thereof was the coin, or clipping thereof, or the plate of the kingdom. 72, 73
- 16 Officers are authorized to *seize* all silver without such mark and certificate. 73 f. 8
- 17 If any broker, not a goldsmith or refiner, shall buy or sell any bullion, or molten silver, he shall be imprisoned six months. 73 f. 9
- 18 The owner shall prove the bullion to be foreign if a doubt arise. f. 10
- 19 No bullion to be entered or shipped, but in the name of the true owner, proprietor, or importer, on pain of forfeiture. ibid.
- 20 By 7 & 8 Will. 3. c. 19. no person shall ship any bullion or molten silver whatsoever, unless on a certificate from the Lord Mayor and Aldermen of the city of London, of oath having been made before the court as *afore said*. (*Vide Supra*, No.) f. 11
- 21 the said court shall certify the same *circumstantially* to the commissioners of the customs before any cocquet, &c. shall be granted. ibid.
- 22 The penalties on the owner, captain, and cocquet officer, for acting contrary this act. ibid.
- 23 For the acts relating to the exportation of corn. 486 (N) 1
- 24 By 2 Geo. 3. c. 14. whoever shall cause any ale or beer, exported as merchandise, to be unshipped, or re-landed, &c. they shall forfeit the same, and 50*l.* for every cask. 513
L. 84
- 25 For the exportation of beef and pork. 520

EXPOSITION,

- 1 It is a general rule, that in doubtful cases, the reason of the common law ought to be followed.

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- ought to govern the construction of a statute. *Page* 58 f. 39
- 2 An affirmative statute saving a particular jurisdiction, shall be so construed as not to abridge the powers of the jurisdiction saved. 14 f. 4.
- 3 An affirmative subsequent statute shall be construed concurrent with a former statute, with which it is consistent. 26
- 4 In what cases the meaning of a statute shall controul the words. 201
- 5 Where a statute shall be construed by equity. 278
- 6 Where a statute begins by naming inferior persons, it shall not be taken to extend to superiors. 177 f. 4
- 7 Where a statute expresses what the law would have implied, the words of the statute shall not operate. 20 f. 8. 33
- 8 A statute taking away clergy from an offence, alters not the nature of it. 112. 151
- 9 Statutes for the preservation of the public peace, shall be construed liberally. 299

Vide Statute, Piracy, Indictment, Preamble.

EXTOL.

- 1 By 5 Eliz. c. 1. advisedly and wittingly to extol and set forth the jurisdiction of the Pope is *præmunire*. 67

EXTORTION.

- 1 Is any oppression, but especially an officer obtaining money colourably, where none or not so much is due, or where it is not yet due. 316. c. 68
- 2 No fees shall be taken but of the king, by any officer concerned in the administration or execution of justice, &c. f. 2
- 3 A prescription by a clerk of the market claiming fees for the view of weights and measures is void. *ibid.*
- 4 The danger of oppression from officers, ancient fees, as the bar fee

- by a sheriff, &c. which they claimed, and an enumeration of the statutes by which their fees are now settled. 316; *Page* 317 (N) 1
- 5 Officers guilty of extortion who take other fees than they are allowed. *ibid.* f. 4
- 6 A promise to pay them more than they are intitled to take is void. *ibid.*
- 7 It is extortion to oblige an executor to prove a will twice over, and to take fees thereon; or to procure a gratuity to become bail for a prisoner; or to arrest a man and procure a release; or to obtain money from a prisoner by any colour of office. *ibid.* (N) 2
- 8 It is extortion for a miller to take more than is due by custom; or for a commissary to take more than his right for absolution; or a ferryman for ferrying; or to force an exorbitant price for places at a fair; or in an under sheriff to refuse execution of process without his fees; or to take a bond for them, or for a coroner to refuse a view. *ibid.*
- 9 Extortion, by the common law, is punishable with deprivation, fine, and imprisonment. And by the statute of Westminster, the offender shall yield twice as much as he takes. 318
- 10 The indictment or information must state the fact particularly. *ibid.* (N) 3
- 11 The sessions may try the indictment. *ibid.*
- 12 An action lies for the double value. *ibid.*
- 13 Defects cured by verdict, and the party will be forced to demur. *ibid.*
- 14 Proof of the smallest possible taking is sufficient; for it is the taking and not the contract which constitutes the crime. *ibid.*
- 15 Aiders are principals, and the offence may be laid in any county. *ibid.*

EXTRA WEIGHT.

- 1 What additional toll shall be paid for extra weight on turnpike roads. 429

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E Y R E.

- 1 By the 25 Edw. 3. c. 2. it is high treason to slay the justices *in eyre* or justices of assize assigned to hear, &c. being in their places during their offices. Page 61
- 2 But not attempt to kill them, or the actual wounding unless death ensue, will amount to this crime. *ibid.*

F.

FACE BLACKED.—*Vide Smuggling.*

F A I R S.

- 1 BY 5 & 6 Edw. 6. c. 25. & 26 Geo. 2. c. 31. no person, except in fairs, shall keep an unlicensed alehouse. 455. f. 11
- 2 Those who brew ale in fairs must give notice to the gaugers that it may be surveyed. *ibid.* (N)
- 3 This indulgence only extends to the place where the common fair is held. *ibid.*
- 4 By 5 & 6 Edw. 6. c. 9. to break open a booth or tent in any market or fair, the owner, his wife, &c. being therein, is felony without clergy.
- 5 By 27 Hen. 6. c. 5. no fair shall be held on the principal festivals, Good Friday, or any Sunday, except the fairs in harvest. 4

FALL.—*Vide Diodand.—Homicide.*

FALSE DICE.—*Vide Dice.—Cheats.*

FALSE TOKENS.—*Vide Cheat. Deceit.*

- 1 By 33 Hen. 8. c. 1. falsely to obtain the property of another by means of any privy false token is a misdemeanor. 344

- 2 What shall be considered a privy false token. Page 345. (N) 2

FALSE MONEY.—*Vide Coin.*

F A L S E N E W S.

- 1 Spreading false news is an indictable offence. 92 f. 4

FALSE OATH.—*Vide Perjury.*

F A M E.

- 1 By 34 Edw. 3. c. 1. justices of peace are impowered to restrain and to take (*inter alia*) of all them that be *not of good fame* sufficient surety for their good behaviour. 261
- 2 It has been thought that this means only such as are *defamed* and justly suspected of an intention to break the peace. f. 2
- 3 But evil fame as properly includes persons of scandalous behaviour in other respects as those who give suspicion of their readiness to break the peace. *ibid.*
- 4 Therefore for those causes of scandal which give a man a *bad fame*, as being *contra bonos mores* only, may be bound to his good behaviour. *ibid.*
- 5 And also all persons whose misbehaviour may reasonably be intended to bring them within the meaning of persons of *evil fame*, the great latitude of which leaves it to the judgment of the magistrate. 262
- 6 A libel is any malicious defamation, expressed in any manner so as to be generally understood. 352. c. 73

FARTHING.—*Vide Half-penny.*

- 1 It is not high treason to coin or counterfeit brass farthings. 62. f. 57
- 2 By 15 Geo. 2. c. 28. whoever shall coin or counterfeit any brass or copper money called a half penny or farthing.

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- thing, their aiders, &c. shall suffer 2 years imprisonment, and find surety for two years more. *Page 71, 72*
- 3 By 11 Geo. 3. c. 40. whoever shall coin or counterfeit a half-penny or a farthing, his aiders, &c. shall be guilty of felony. *72. f. 5*
- 4 Whoever shall buy, sell, take, receive or put off any counterfeit copper money not cut in pieces for lower than its nominal value shall be guilty of felony. *ibid.*
- 5 The houses of such counterfeiters may be searched. *ibid.*
- 6 Whoever shall alter (in the way mentioned) a farthing, with intent to make it resemble a fixpence, his aider, &c. shall be guilty of high treason. *65*

FAST DAYS.

- 1 By 2 & 3 Edw. 6. c. 19. & 5 Eliz. c. 5. it is made penal to affirm that any eating of fish or forbearing of flesh mentioned therein is necessary to salvation that it is the service of God. *13. f. 7*
- 2 By 27 Hen. 6. c. 5. no fair or market shall be held on the principal fast days, except the fair Sundays in harvest, on pain of forfeiting the goods exposed to sale. *11*

FEE S.—*Vide Extortion.*

- 1 By 26 Geo. 2. c. 14. & 27 Geo. 2. c. 16. the fees of justices clerks are regulated.
- 2 By 23 Geo. 2. c. 26. f. 10. the fees of records out of the exchequer regulated.
- 3 By 3 Geo. 1. c. 13. f. 16. certain fees of sheriffs are settled.

FEE SIMPLE and FEE TAIL.— *Forgery by 5 Eliz.*

- 1 The recusant heir of a recusant ancestor has no remedy but by conforming to free his fee simple lands from the forfeiture incurred by his ancestor's conviction, whether the lands

were seized in the ancestor's life-time or not. *Page 30. f. 56*

- 2 But the fee-tail lands which the heir claims from the ancestor is not chargeable after his death on any conviction by proclamation, &c. *f. 57*
- 3 Lands entailed are not within the statute of *præmunire* after the death of the offender. *85. f. 48*

FEAR.—*Vide Robbery.*

- 1 Larceny from the person by putting in fear is called robbery. *147*
- 2 Money delivered in consequence of an oath, compelled by fear is robbery. *ibid. f. 1*
- 3 Fear is the distinguishing ingredient between robbery and other larcenies. *ibid. (N) 3*
- 4 Therefore if the fear be exerted subsequent to the taking, it is larceny, but not robbery. *ibid.*
- 5 So where no fear is impressed for the purpose of obtaining the property. *ibid.*
- 6 But it is not necessary that the fact of actual fear should either be laid in the indictment or proved upon the trial. *149 (N) 4*
- 7 Proof of such acts as may reasonably be supposed to excite fear and apprehension in the human mind are sufficient, if the party parts with his money under the influence of them. *ibid.*
- 8 For in *odium spoliatoris* the law will presume fear where there appears a just ground for it. *ibid.*
- 9 How fear is properly expressed in an indictment. *150*

FELONY.

- 1 Capital offences, by the common law, come generally under the title of felony; which signifies *quodlibet crimen felleo animo perpetratum*. *99. c. 25*
- 2 It can be expressed by no *periphrasis* without the word *felonice*. *ibid. 1. 1*
- T t 3 3 Felonies

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- 3 Felony is included in high treason ; and a pardon of felony pardons treason, if the word *proditorie* be omitted. Page 99 f. 2
- 4 It is always accompanied with an evil intention. f. 3
- 5 It shall not be imputed to a mere mistake or mis-animadversion. *ibid.*
- 6 Anciently the bare *intention* to commit felony was considered as felonious. *ibid.*
- 7 But now felony shall not be imputed to a bare intention to commit it. *ibid.*
- 8 But the party may be very severely fined for such an intention. *ibid.*
- 9 Felony in general signifies every species of crime which occasioned at common law the forfeiture of land or goods. *ibid.* (N)
- 10 All offences, now capital, are in some degree or other, felony. *ibid.*
- 11 But offences may be felonies without being capitally punished. *ibid.*
- 12 The true definition of felony is "an offence which occasions a total forfeiture of lands or goods or both at the common law and to which capital or other punishment *may be* super-added according to the degree of guilt." *ibid.*
- 13 Capital punishment may be inflicted and yet the offence be no felony. *ibid.*
- 14 The true criterion of felony is forfeiture. *ibid.*
- 15 But by common usage of the law the term felony is inseparably applied to capital punishments. *ibid.*
- 16 Therefore if a statute make an offence felony, the law implies that it shall be punished with death and forfeiture. *ibid.*
- 17 Where a statute decrees an offence to undergo judgment of life and member, the offence becomes a felony though that word be omitted. 168. f. 1
- 18 But felony shall not be implied from any doubtful or ambiguous words in a statute. *ibid.* f. 2
- 19 Therefore if a statute only prohibit under pain of forfeiture, &c. the offence shall be considered a misdemeanor only. f. 3
- 20 Where a statute makes a second offence felony or subject to a heavier punishment than the first, it must be after conviction. Page 168, 169
- 21 What shall be incidentally implied in every statute which makes an offence felony. 169. f. 4 & 5
- 22 If one commit an offence made felony by statute, and the statute be repealed he cannot be punished for the felony. f. 6
- 23 For misprision of felony. 251

FELONIES WITHIN CLERGY.

Affault.

- 1 Assaulting persons with intent to tear or spoil their clothes, 6 Geo. 1. c. 23. f. 11. 238

Bridges.

- 2 Destroying Walton bridge, 20 Geo. 2. c. 22. Hampton Court bridge, 23 Geo. 2. c. 37. f. 12. Ribble bridge, 24 Geo. 2. c. 36. f. 34. Sandwich bridge, 28 Geo. 2. c. 55. Wye bridge, 29 Geo. 2. c. 73. Black Friars bridge, 29 Geo. 2. c. 86. Jeremy Ferry's bridge, 30 Geo. 2. c. 59. Old Brentford bridge, 30 Geo. 2. c. 63. f. 19. 31 Geo. 2. c. 46. Trent bridge, 31 Geo. 2. c. 59. 193, 194

Bail.

- 3 Personating bail before commissioners in the country, 4 W. & M. c. 4. f. 4. 178. f. 9. 179. f. 11

Common.

- 4 Destroying fences set up for inclosing common or waste land, by act of parliament, 9 Geo. 3. c. 29. f. 3. 192 f. 4

Copper.

- 5 Removing copper, brass, &c. from any dwelling house, &c. with intent to steal; assisting, or buying such goods, knowing them to be stolen, 21 Geo. 3. c. 68. 218 f. 14

Cont.

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FELONIES WITHIN CLERGY CONTINUED.

Corn.

- 6 Destroying granaries, the second offence, 11 Geo. 2. c. 22. Page 143

Customs.

- 7 Assembling armed to the number of three for running goods, 9 Geo. 2. c. 35. f. 10. 227, app. 6
8 Persons deemed smugglers according to the description of 9 Geo. 2. c. 35. f. 13. *ibid.*
9 Harboursing offenders against the laws of customs, 19 Geo. 2. c. 34. f. 3. 24 Geo. sess. 2. c. 47. f. 12. 231

Dikes.

- 10 Cutting them in marsh land, 22 H. 8. c. 11. 2 & 3 Ph. & M. c. 19. 198

Fish.

- 11 Fishing in another's pond with intent to steal, 31 H. 8. c. 2. 221 in margin.

Foreign State.

- 12 Serving it without taking oath of allegiance, 3 Ja. 1. c. 4. f. 18. 74 f. 15

Forgery.

- 13 Of bank bills, 11 Geo. 1. c. 9. f. 6. 205 f. 2
14 Of bank notes and indorsements. *ibid.*

Gaoler.

- 15 Forcing prisoner to become approver, 14 Ed. 3. c. 10. 194 c. 51

Hawk.

- 16 Stealing one, 37 Ed. 3. c. 19. 143 f. 23

Hunting.

- 17 In the night or in disguise, 1 H. 7. c. 7. 186

FELONIES WITHIN CLERGY CONTINUED.

- 18 Rescuing such offenders. Page 218

Jewels and Plate.

- 19 Receiving jewels and plate, knowing them to have been stolen, 10 Geo. 3. c. 48. 235 f. 9

Iron Bars.

- 20 Stealing them, fixed to buildings, 4 Geo. 2. c. 32. 218 f. 13

King.

- 21 Conspiring, or imagining to destroy him, or any of his council, 3 H. 7. c. 14. 74 f. 13

Labourers.

- 22 Confederacies of masons to prevent the Statutes of labourers, 3 H. 6. c. 1.

Lead.

- 23 Entering mines of black lead with intent to steal, 25 Geo. 2. c. 10. f. 1. 218 f. 12
24 Stealing it fixed to buildings, 4 Geo. 2. c. 32. 218 f. 13
25 Receivers of lead so stolen. *id.* f. 3.
26 Buying or receiving lead, iron, copper, &c. knowing it to be stolen, 29 Geo. 2. c. 30. 232 f. 2

Locks.

- 27 Persons guilty of demolishing them, or of sluices or floodgates, 1 Geo. 2. ft. 2. c. 19. 199 f. 2.

Maiming.

- 28 And after cutting out tongues or putting out eyes, 5 H. 4. c. 5. 176 f. 7

Marriage.

- 29 Solemnizing it clandestinely, 26 Geo. 2. c. 33. f. 8. 173 f. 11

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FELONIES WITHIN CLERGY CONTINUED.

Money.

- 30 Transportation of silver, or importation of false money, 17 Ed. 3. Page 70. f. 1
31 Blanching copper or putting off counterfeit money, 8 & 9 W. 3. c. 26. f. 6. 71. f. 2
32 Counterfeiting copper halfpence or farthings, 11 Geo. 3. c. 40. f. 1. 72. f. 5
33 Receiving or paying counterfeit copper money, *ibid.*

Mutiny.

- 34 In mariners hindering commanders from fighting, 22 & 23 Car. 2. c. 11. f. 9. 185. f. 10
35 Officer or soldier upon or beyond the sea raising mutiny, disobeying or resisting superior, 2 & 3 Ann. c. 20. f. 35.

Palaces.

- 36 Entering into king's house, with intent to steal, 33 H. 8. c. 12. f. 27.

Pewter.

- 37 Buying or receiving pewter pots, or other pewter, knowing them to be stolen, 21 Geo. 3. c. 69. 235. f. 10

Post Office.

- 38 Frauds respecting the postage of letters, 5 Geo. 3. c. 25. f. 19. 7 Geo. 3. c. 50. f. 3. 140

Prisoner.

- 39 Assisting one committed for treason or felony (except petty larceny) to attempt an escape, 16 Geo. 2. c. 31. Bk. 2.

Plague.

- 40 Persons infected with it going abroad, 1 Jac. 1. c. 31. f. 7. 241

FELONIES WITHIN CLERGY CONTINUED.

Poligamy.

- 41 By 1 Ja. 1. c. 11. Page 174

Records.

- 42 Withdrawing them, 8 H. 6. c. 12. 177

Rogues.

- 43 Incorrigible, breaking out or escaping from house of correction, or offending a second time, 17 Geo. 2. c. 5. f. 9. 572

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- 44 Stealing furniture from lodgings (if under 12 d.) 3 W. & M. c. 9. f. 5. 127. f. 10
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- 82 Seamen's tickets, wills, &c. 9 Geo. 3. c. 30. f. 6. 212
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- 17 Any person maliciously lying in wait, 22 & 23 Car. 2. c. 1. 176 f. 4

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- 18 Firing engines for draining them, the second offence, 11 Geo. 2. c. 34. 14 Geo. 2. c. 24. 21 Geo. 3. c. 18. 200 f. 8

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 105 Persons arraigned for felony or piracy, and standing mute, shall be convicted, 12 Geo. 3. c. 20. 3 (N) 6

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- 106 For offences not within the benefit of clergy. 1 Ed. 6. c. 12. 4 & 5 Ph. & M. c. 4. 8 El. c. 4. 18 El. c. 7. 22 Car. 2. c. 5. 3 & 4 W. & M. c. 9.

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- 118 Persons transported for assisting prisoners to escape, and returning, 16 Geo. 2. c. 31. Escaping a second time from confinement, to hard labour in lieu of transportation, 16 Geo. 3. c. 13. f. 15. 245

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- 119 They who attempt to kill, or do strike or wound them in the execution of their office, 9 Ann. c. 16. 74 f. 14

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- 127 Concealing or clandestinely conveying letters or goods, 26 Geo. 2. c. 6. f. 18. ibid.

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- 128 Carnally knowing woman child under the age of ten years, 18 El. c. 7. f. 4. 170 f. 4

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- 129 Rescuing convicts from transportation, 6 Geo. 1. c. 23. f. 5.
- 130 Rescuing any person committed for, or found guilty of murder, or going to execution, or during execution, 25 Geo. 2. c. 37. f. 9. Bk. 2
- 131 Persons transported for rescuing the body of such offenders, after execution from the sheriff or surgeon, &c. and returning, 25 Geo. 2. c. 27. f. 10. ibid.

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- 133 Persons aiding them to such purposes, 2 Geo. 20. c. 46. f. 2.
- 134 Or holding correspondence with them, or with persons employed by them, by letters or otherwise, 20 Geo. c. 46. f. 3.

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- 135 Acknowledging it in the name of another, 21 Ja. 1. c. 26. 1781.9

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 138 Or hindering proclamation being made, 1 Geo. 1. st. 2. c. 5. f. 5. *ibid.*

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 143 On board any vessel, or on any wharf, to the value of 40s. 24 Geo. 2. c. 45. 146
 144 Stealing furniture, &c. from lodgings (if above 12 d. value) 3 & 4 W. & M. c. 9. f. 5. 137. f. 10
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- 147 By 14 Geo. 2. c. 6. extended to bull, cow, &c. by 15 Geo. 2. c. 34. 180. f. 3

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- 148 By 8 Geo. 1. c. 18. 227. ap. 6
 149 Assembling armed for running of goods, 19 Geo. 2. c. 34. f. 1. 227. ap. 6
 150 Persons transported for assisting in running goods, and returning, 9 Geo. 2. c. 35. f. 10. *ibid.*
 151 Persons convicted of running goods, returning from transportation, 8 Geo. 1. c. 18. f. 6. *ibid.*

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- 152 Treasons, robberies, felonies, murders, and confederacies, done upon the sea, 28 H. 8. c. 15. f. 3. 152

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- 153 Personating them to receive their pay, 31 Geo. 2. c. 10. f. 24. 212. f. 22

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 159 Inlifting or causing others to inlift in foreign service, 9 Geo. 2. c. 30. 74. f. 16
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- 161 Officer or servant embezzling their effects, 24 Geo. 2. c. 11. f. 3.

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- 164 Acknowledging it in the name of another, 21 Ja. 1. c. 26. 178. f. 9

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- 165 Imbezzling them to the value of 20s. or offending against 31 El. c. 4. concerning imbezzlement of stores, 22 Car. 2. c. 5. f. 3. 75. f. 18
 166 Burning or otherwise destroying ships of war, buildings in dockyards, &c. or military stores, 12 Geo. 3. c. 24. 75. f. 19

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- 167 Felons returning within the time, 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 16 Geo. 2. c. 15. 24 Geo. 3. c. 12. f. 11. 244 to 250

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 169 Destroying toll gates, weighing engines, &c. or rescuing offenders, 13 Geo. 3. c. 84. f. 42. 192. f. 5

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- 171 Unlawful exporters returning after transportation, 4 Geo. 1. c. 11. f. 6. 195. c. 52
 172 Opposing officers of customs, excise, &c. in seizing wool, 12 Geo. 2. c. 21. f. 26. ibid.
 173 Destroying woollen goods, or rack, or tools, 12 Geo. 1. c. 34. f. 7. See Cloth. Bk. 2
 *173 Entering by force any house with intent to destroy any woollen goods or tools used for manufacturing, 22 Geo. 3. c. 40. f. 1. 239

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- 174 Stealing them, and marrying or defiling them, having lands or goods, or being heirs apparent, 39 El. c. 9. 171
 175 After conviction of an offence that was within clergy, ousted of it on conviction of any other felony, 3 & 4 W. & M. c. 9.

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- 176 Making holes in ship in distress, or stealing pump, 12 Ann. st. 2. c. 18. f. 5. 219
 177 Plundering shipwrecked goods, or beating, &c. with intent to kill, or otherwise obstructing the escape of any person from such ship, or putting out false lights with intent to bring any ship into danger, 26 Geo. 2. c. 19. 220

FELONIOUS.

A TABLE OF PRINCIPAL MATTERS.

FELONIOUS HOMICIDE.--Murder. *Manſlaughter.*

- 1 There are only two ſpecies of felonious homicide, viz. murder and manſlaughter. Page 115
- 2 Theſe are either with or without malice. ibid. c. 30
- 3 That without malice is called manſlaughter, and ſometimes chance medley. ibid. f. 1
- 4 This is ſuch a killing as happens upon a ſudden quarrel; or in the commiſſion of an unlawful act, without any deliberate intention of doing miſchief. ibid.
- 5 There can be no acceſſaries to manſlaughter, becauſe it muſt be done without premeditation. 115
- 6 Felonious homicide, with malice, is either murder or petit treaſon. 117 c. 31

FELO DE SE.

- 1 Homicide may be againſt a man's own life. 102 c. 27
- 2 To commit the crime of *ſelf-murder*, the offender muſt be of the age of diſcretion, and *compos mentis*. 102 f. 1
- 3 The common concluſion that a *ſelf murderer* muſt *ipſo facto* be *non compos mentis*, as being contrary to nature and all ſenſe and reaſon, is abſurd. f. 2
- 4 Its repugnancy to the duties of humanity rather aggravates, than excuſates the offence. f. 3
- 5 The murder of a child or parent is as much againſt reaſon and nature. ibid.
- 6 The abhorrence of the law reſpecting this crime. 102, 103
- 7 One who maliciously attempts the death of another, and in purſuance thereof, unwillingly kills himſelf, is *ſelo de ſe*. 103
- 8 Wherever death is cauſed by an act done with a murderous intent, it makes the offender a murderer. ibid.
- 9 This rule illuſtrated. ibid. f. 5
- 10 To kill another by deſire, is murder, and the perſon killed is not *ſelo de ſe*. f. 6

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- 11 But where two perſons take poiſon, and one ſurvive, he who purchaſed the poiſon is not a murderer, though the one who dies is a *ſelo de ſe*. P. 103 f. 6
 - 12 A *ſelo de ſe* ſhall forfeit all chattels, real or perſonal, on his own right; all chattels poſſeſſed jointly with his wife or in her right; and all bonds, &c. perſonal things in action which belong to himſelf—and perhaps entire chattels in poſſeſſion to which he is jointly entitled with another, *except merchandize*, but he ſhall forfeit only a moiety of joint chattels which may be ſeized, and nothing as executor or adminiſtrator. f. 7
 - 13 The blood of a *ſelo de ſe* is not corrupted, nor his lands of inheritance forfeited; nor his wife barred of dower. f. 8
 - 14 No part of the perſonal eſtate is veſted in the king before inquiſition found. 104. f. 9
 - 15 But after inquiſition, the forfeiture relates back to the time the wound was given. f. 10
 - 16 Inquiſition ought to be *ſuper viſum corporis* which cannot be traversed. f. 11
 - 17 If the body cannot be found, juſtices of peace or the king's bench, if in the county where it ſits, may take in-quiſition, and this in-quiſition may be traversed. f. 12
 - 18 How ſuch in-quiſitions ought to ſtate the facts. 13, 14
 - 19 They are in the nature of indictments. ibid.
 - 20 If they be full in ſubſtance, defect of form may be amended. f. 15
- Vide Coroner. Corruption of Blood. Dower. Forfeiture. Inquiſition. Pardon. Year and Day.*

FEME COVERT.

- 1 A feme covert, favoured in reſpect of her huſband's authority over her, ſhall not be puniſhed for committing a bare theft in company with or by coercion of her huſband. 3, 4
 - 2 This exemption extends to burglary and perhaps to robbery. 4 (N) 8
- U u 3 A feme

A TABLE OF PRINCIPAL MATTERS.

- 3 A feme covert shall not be deemed an accessory to a felony for receiving her husband who has been guilty of it. Page 4. f. 10
- 4 Nor shall she be deemed a principal for such reception, if the husband has been guilty of treason. (N) 9
- 5 Neither is she affected by receiving, jointly with her husband, any other offender. ibid.
- 6 She cannot be admitted as a witness even *collaterally* to discover her husband's guilt. ibid.
- 7 But if a *feme covert* commit a theft of her own voluntary act, or by the bare command of her husband (*quere*) or be guilty of treason, murder, or (*quere*) robbery, in company with or by coercion of her husband she is punishable. 4. f. 11
- 8 Or if she receive stolen goods without her husband's privity, or if he, knowing it, disclaims her, she may be punished as accessory. ibid. (N) 10
- 9 A wife may be indicted together and condemned to the pillory with her husband for keeping a bawdy house 4. f. 12
- 10 Therefore an action will lie for saying she keeps a bawdy house. 357 (N) 1
- 11 Generally a feme covert shall answer for any offence not capital. 4. f. 13
- 12 If the offence be of a nature which she may commit alone, the husband need not be joined in the indictment, provided he is no way privy. ibid.
- 13 If a woman bring a false appeal of death, she shall be imprisoned alone. 4. 5
- 14 But for a forfeiture, the husband may be made liable, by joining him in the prosecution. 5
- 15 Several offences for which a woman may be indicted alone, enumerated. 5 (N) 11
- 16 A *feme covert* is within the 1 & 23 of Eliz. imposing penalties on absence from church; and an information lies against the husband. 22. f. 11 (N)
- 17 It is very doubtful whether the conviction of a *feme covert* upon an indictment can be pleaded to an information against her and her husband. 27
- 18 The husband is not liable to pay a forfeiture recovered against his wife upon an indictment. Page 27

F E N C E S.

- 1 The offence of levying dykes by approvers. 191. c. 50
- 2 By 6 Geo. 1. c. 16. to destroy fences round woods or plantations, is three months correction and the parish liable to the damage. 192. f. 2
- 3 By 16 Geo. 3. c. 30. to destroy the fences of deer parks, is transportation. ibid. f. 3
- 4 By 9 Geo. 3. c. 29. to destroy fences of waste lands inclosed, transportation. ibid. f. 4
- 5 By 4 Geo. 2. c. 32. to break with intent to steal any lead, iron bar, palisade, or rail fixed to a dwelling house or its appurtenances or any other buildings, transportation. 218. f. 13
- 6 A church is within the words of this act. ibid. (N) 1

F E R Æ N A T U R Æ.

- 1 Larceny may be committed of animals *feræ naturæ* if they be fit for food and reduced to tameness; and known by the offender to be so. 144. f. 26
- 2 But otherwise, larceny cannot be committed of them, because animals *feræ naturæ* are goods whereof no particular person has a property. 143. f. 24

FERN.—*Vide Burning.*

- 1 By 4 & 5 W. & M. c. 23. (for preserving the red and black game) no persons shall burn on the mountains, &c. any fern, &c. between 2d. Feb. and 24th. June, on pain of imprisonment. 224 (N)
- 2 By 28 Geo. 2. c. 19. (for preserving deer and game) no person without right or legal licence, shall burn, &c. any gale, turze, or fern upon any land.

A TABLE OF PRINCIPAL MATTERS.

forest or chase, on pain of from 40s. to 5 l. Page 224

FIDELITY.—*Vide Oaths.*

FIIGHTING.—*Vide Duel. Murder. Affray. Riot. Piracy.*

FIRE.—*Vide Arson. Burning. Incendiaries.*

- 1 By 6 Ann. c. 31.—12 Geo. 3. c. 73. f. 35.—14 Geo. 3. c. 78. f. 84. if any menial or other servant, through negligence shall fire or cause to be fired any dwelling house or out-house they shall forfeit 100 l. on conviction by one witness, &c. or suffer eighteen months imprisonment. 197. e. 53

F I R.—*Vide Trees.*

FIREWORKS.

- 1 By 9 & 10 W. 3. c. 7. to make, sell or expose to sale any fireworks, or any cases, moulds, or implements for making them, incurs a penalty of 5 l. 363
- 2 If any person shall, or shall suffer fire works to be *let off* in or from their house in any public street or highway, they shall forfeit 20s. 364
- 3 And every such offence shall be adjudged a common nuisance. *ibid.*

FIRE ENGINE.

- 1 By 9 Geo. 3. c. 29. to damage or destroy any fire engine belonging to any colliery, on conviction within eighteen months, incurs a penalty of transportation. 238. f. 4

F I S H.

By 5 Eliz. c. 21. to destroy fish ponds, &c. incurs three months im-

prisonment, security for seven years, and compensation to the party grieved. Page 221

- 2 By 4 & 5 W. 3. c. 23. no persons, except fishermen and the owners of fisheries shall keep nets, &c. f. 2
- 3 By 22 & 23 Car. 2. c. 25. no person shall use any net, &c. in the fishery of another without the consent of the owner. f. 3
- 4 By 9 Geo. 1. c. 22. whoever, *armed and disguised* shall steal fish, or rescue an offender, shall suffer without benefit of clergy. 222 f. 4
- 5 By 5 Geo. 3. c. 14. whoever shall enter into any inclosed place belonging to a dwelling house where a stream of water shall run, and steal or destroy fish, or buy them, &c. shall be transported for seven years. f. 5
- 6 And to steal or destroy fish, in any inclosed ground being private property incurs a penalty of 5 l. on conviction in a summary way. f. 6
- 7 Lord Mansfield's opinion upon this act. 223. (N)
- 8 By 3 Ed. 1. c. 20. trespassers in fish ponds shall suffer three months imprisonment, &c. 516. f. 92
- 9 No salmon unless eighteen inches from the eye to the tail, or the spawn of salmon shall be destroyed in certain rivers, &c. f. 93
- 10 No salmon under 6 lb. weight shall be sent to London. f. 94
- 11 No salmon to be taken from April to Midsummer. f. 95
- 12 No nets called stalkers shall be used. f. 96
- 13 By 17 Rich. 2. c. 19. The lord mayor of London shall preserve the fish in the Thames and Medway. f. 97
- 14 What *sizes* other fish shall be of before they are taken. 519 f. 98
- 15 Of the kind of nets which may be used. *ibid.*
- 16 How offenders may be punished. 518
- 17 No person shall take or have possession of any unsizeable fish, or fish out of season, or any smelt, not 5 inches long. f. 99
- 18 No persons shall fasten nets over rivers to stand both day and night. 100

A TABLE OF PRINCIPAL MATTERS.

- 19 The penalty and rules for fishing on the coasts of the sea. *Page* 101, 102
- 20 No fish under certain sizes shall be sold except the same be sold for or under 6 d. a pound. 103, 104
- 21 Within what time lobsters shall be taken. 105
- 22 Rules respecting the importation of fish. 520

FINGER.

- 1 Cutting off, or disabling, or weakening a man's hand or finger, is esteemed a *maim*. 175 f. 2
- 2 It is punishable with fine and imprisonment. 176
- 3 By 22 & 23 Car. 2. c. 1. to disable any limb or member, with intention to maim and disfigure, is death without clergy. f. 4

FLEET.

- 1 By 22 Geo. 2. c. 33. every person in the *fleet* who shall waste, embezzle, or not carefully preserve any powder, shot, ammunition, or other stores and provisions, their abettors, buyers and receivers, being persons subject to naval discipline shall be punished at the discretion of a court martial. 76 f. 20
- 2 And every person in the fleet who shall burn or set fire to any magazine, or store of powder, or ship-boat, &c. &c. or the tackle thereto belonging, not then appertaining to an enemy, pirate, or rebel, on conviction by court martial, shall suffer death. *ibid.*
- 3 Whoever, in his majesty's fleet, shall be guilty of profane curling and swearing, they shall be punished by the discretion of a court martial. 13
- 4 A court martial also shall condemn any person in the fleet guilty of sodomy, to death. 10

FLOUR.—*Vide Bread.*

FLOUNDERS.—*Vide Fish.*

FOOTWAY.—*Vide Nuisance. Highway.*

- 1 There are three kinds of ways, 1st. a footway; 2d. a pack and prime way, which is both a horse and a footway; 3d. a cart way. *Page* 366
- 2 A nuisance in a footway is punishable at the leet. *ibid.*

FORCE.—*Vide Robbery. Black Act.*

- 1 To withstand the authority of the king, in a violent and forcible manner, is an overt act of levying war. 54 f. 23
- 2 What degree of force a man must endeavour to resist to excuse him from the guilt of treason. *ibid.* (N) 3
- 3 By 25 Geo. 2. c. 10. by force to enter into any black lead mine, with intent to take and carry away any cawke, &c. is punishable by whipping or transportation. 218
- 4 Forcibly to enter any place with intent to destroy the looms, &c. in the linen, woollen, cotton, and silk, &c. manufacture, is felony without clergy. 239, 240

FORCIBLE ENTRY AND DETAINER.

- 1 By common law, a man, within proper time, might regain *bis possessio* by force; and he may now justify the retaking of his *goods*, wrongfully withheld. 274 c. 64
- 2 But such a repossession of *lands* is now restrained. f. 2
- 3 On an action for a forcible entry, if the defendant proves his title to the lands, &c. he shall not pay damages to the plaintiff for *the force*; but he may be punished as a disturber of the public peace. f. 3
- 4 An indictment lies at common law for a forcible entry; but the actual force must be charged. *ibid.* (N) 1
- 5 By 2 Ed. 3. if arms which strike a terror, are used in making the entry, the

A TABLE OF PRINCIPAL MATTERS

- the persons authorized by that statute (*Vide* page 266) may seize the arms and imprison the offenders; but they cannot restate the party injured to his possession. *Page 275 f. 5*
- 6 By 5 Rich. 2. c. 7. whoever shall make entry into lands, with *strong hand*, and with multitude of people, shall suffer imprisonment. *ibid. f. 6*
- 7 By 5 Rich. 2. c. 2. Justices, with the power of the county, may commit such as hold forcibly after an entry made. *f. 7*
- 8 And he shall make a record of the fact, which is not traversable, because he acts not as a minister but as a judge. *f. 8*
- 9 He may also assess the fine for the offence. *ibid.*
- 10 But the commitment must be upon a *view* of the fact, or for want of finding sufficient sureties. *ibid.*
- 11 If the party traverse the entry, or the force, or plead three years possession, the justice may summon a jury and try the traverse. *ibid.*
- 12 By 18 Hen. 6. c. 9. justices are empowered to examine the offence, and put the party intitled into full possession. *f. 9 & 10*
- 13 For which purpose they may direct the sheriff to impanel a jury, each having 40s. a-year. *277 f. 11*
- 14 Penalty on jurors or sheriff neglecting their duty. *ibid.*
- 15 This power extended to all magistrates. *f. 12*
- 16 But this power shall not extend to dispossess those who have had possession for three years. *f. 13*
- 17 By 31 Eliz. c. 11. this security confirmed, &c. the party may alledge the three years peaceable occupation in bar of restitution. But the fact, on being traversed, may be tried by the justice, who may award costs, &c. *278*
- 18 If a lessee or copyholder be ousted, and the lessor, or lord, disseized, restitution to the lessee, or copyholder, is a release of the freehold. *f. 15*
- 19 By 21 Jac. 1. c. 15. the court may grant restitution to termors, copyholders, tenants by *disseizure*, statute merchant and staple. *Page 278 f. 16*
- 20 *Quere*, If a tenant by the verge be within the statute.
- 21 A lessor who ejects his lessee, and is then forcibly put out of possession, is not within any of the statutes. *279*
- 22 But in either of the last cases, the justice, may remove the force and commit the offender. *f. 18*
- 23 What shall be esteemed an entry. *f. 19*
- 24 The bare trespass by a pretender to the lands, although armed, &c. unless he actually claim by circumstances of force and terror is not an entry. *f. 20*
- 25 Aiders are principal offenders, although they do not actually enter. *f. 22*
- 26 One who continues forcibly, under a defeasible title against him who has a right of entry, is within the statutes. *280*
- 27 But not one who barely agrees to a forcible entry, made to his use. *f. 24*
- 28 What entry is forcible. *f. 25*
- 29 It must be with actual *violence and terror*; not such as the law implies in trespasss. *f. 26*
- 30 What degree of *violence* is necessary. *ibid.*
- 31 What circumstances will amount to *terror*. *281*
- 32 What DETAINER shall be adjudged forcible. *f. 30*
- 33 A forcible entry or detainer may be committed upon ecclesiastical possessions, as well as upon temporal, or incorporeal hereditaments, for which entry will lie; but not upon a way or easement. *282*
- 34 Who may be guilty of this offence. *f. 32*
- 35 What ought to be the form of a record, upon the statutes of forcible entry. *f. 36 to p. 287 f. 44*
- 36 Of what kind of possession restitution is to be awarded. *ibid. f. 45*
- 37 To whom and in what manner such restitution ought to be made. *288 f. 46*
- 38 By whom and in what manner such restitution may be awarded and given. *f. 49*

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- 39 How restitution should be barred by a continuance of possession for three years. *Page* 289 f. 53
 40 For what other causes such restitution may be stayed. 291 f. 59
 41 How such a restitution may be superceded before it is executed. 292 f. 61
 42 How such a restitution may be set aside after it is executed. f. 63

FORCIBLE MARRIAGE.

- 1 By 3 Hen. 7. c. 2. whoever shall take a maid, widow, or wife, against her will, their abettors, procurers, and knowing receivers, shall be reputed principal felons. 171 c. 42
 2 By 39 Eliz. c. 9. all principals, or procurers, or accessaries, before such offence, are excluded from clergy. f. 2
 3 The indictment must set forth that the woman had lands, or goods, or was heir apparent, and also that she was married or defiled. f. 3
 4 So also it ought to state, that the taking was for lucre. 172 f. 4
 5 If a subsequent force is used, it is immaterial whether the original taking was voluntary or not. f. 5
 6 Receivers are not principals unless they receive the woman; but a reception of the man only will make an accessory after the fact. f. 7
 7 A subsequent consent will not purge the offence, if the original taking be forcible. f. 6
 8 *Privies*, who are no way parties, are not within the statute. f. 8
 9 A woman taken in one county and married in another, the offender may be tried in the last county. f. 9
 10 A woman forcibly taken, may give evidence against the offender, although she be married to him. (N) 5

FORDS.—*Vide Highways.*

FORE-TEETH.

- 1 It is said that striking out a man's fore teeth, shall be punished by fine

and imprisonment, as a *maim*, because he is rendered thereby less able, in fighting, to annoy his adversary. *Page* 175 c. 44

FOREIGN.—*Vide Coin.*

- 1 What places shall be considered as foreign. 65 f. 67

FOREIGN EDUCATION. — *Vide Education.*

FOREIGN PRINCE.—*Enlising.*

1. By 3 Jac. 1. c. 4. whoever shall go out of the realm, and, or to, serve a foreign prince or state, not having before taken the oath of obedience, shall suffer as a felon. 74 f. 15
 2 And if any gentleman, or officer, shall do so, without being bound by two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against the king, he shall suffer as a felon. *ibid.*
 3 By 9 Geo. 2. c. 30. whoever shall enlist himself, or procure another to enlist himself, or to go abroad, or on board of ship, with intent to enlist himself in the service of a foreign prince, without licence, shall suffer death without clergy. f. 16
 4 By 29 Geo. 2. c. 17. if any subject shall accept of any commission in the service of the French king, without licence, shall suffer death without clergy. 75 f. 17
 5 Whoever shall enter into the Scotch brigade, in the service of the States General, and shall not, within six months from the date of his commission, take, and subscribe, the oaths of allegiance and abjuration, and transmit a certificate thereof, to the secretary at war, shall forfeit 500l. half to the king, and half to the prosecutor. *ibid.*
 6 Summoning a man to appear and defend himself, before a foreign prince, was anciently high treason. 40

7 And

A TABLE OF PRINCIPAL MATTERS.

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| <p>7 And writing letters to a foreign prince, inviting him to invade the realm, is now high treason. <i>Page 51</i></p> <p>8 Soliciting a foreign prince, in amity with the crown, to invade the realm, is an overt act of <i>the intention</i> to levy war, and may be laid <i>as an overt act of compassing the king's death.</i> 56 (N) 7</p> <p>9 It is so high an offence to prefer the the interest of a foreign prince, that it is criminal to do any thing which may incline a man so to do. 91 f. 3</p> | <p>any matter <i>of record</i>; or any other <i>authentic</i> matter of <i>a public nature</i>; as a parish register, any deed, or will. <i>Page 335. c. 70. f. 1</i></p> <p>3 The punishment is fine, imprisonment, and any corporal punishment. <i>ibid.</i></p> <p>4 If a man make a feoffment to one, and afterwards make a feoffment to another of the same lands, of <i>a date prior to the first</i>, it is forgery. 336</p> <p>5 So also if he had passed only an equitable interest. <i>ibid.</i></p> |
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FORESTALLING.—*Vide Engrossing.*

FORFEITURE.

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| <p>1 If a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same. 5</p> <p>2 An offender executed by virtue of the writ <i>de hæretico comburendo</i>, forfeits neither land nor goods. 7 f. 10</p> <p>3 The limitation of a forfeiture to the crown, in a statute, is mere surplus. 26 f. 33</p> <p>4 Whether a forfeiture is saved by the death of the party within the time limited for the payment of it. 14 f. 6</p> <p>5 What shall be forfeited by <i>seco de se.</i> 103 f. 7</p> <p>6 The forfeiture is saved by a pardon before inquisition found. 104</p> <p>7 After inquisition, the forfeiture shall relate back to the time the mortal wound was given. <i>ibid.</i></p> <p>8 Nothing shall be forfeited as a deodand unless the party die within a year and a day. 101 f. 7</p> <p>9 But if he die within the time, the forfeiture shall relate back to the time of the wound. <i>ibid.</i></p> | <p>6 If a person, in drawing the will of another, insert legacies of his own head, it is forgery. <i>ibid.</i></p> <p>7 If one finding another's name at the bottom of a letter, and causes the writing to be cut off and a general release to be written over the name, and then takes off the seal and fixes it to the release, it is forgery. <i>ibid.</i></p> <p>8 To insert in an indictment the names of those against whom in truth it was not found, is forgery. <i>ibid.</i></p> <p>9 So also to make any fraudulent alteration of the form of a true deed in a material part of it. <i>ibid.</i></p> <p>10 As by making a lease of the manor of <i>Dale</i> appear to be a lease of the manor of <i>Dale</i> by changing the <i>D</i> into <i>S</i>. <i>ibid.</i></p> <p>11 Or by making a bond for 500 l. appear to be for 5000 l. by an additional cypher. <i>ibid.</i></p> <p>12 Sir Edward Coke's opinion that a deed so altered is rather <i>false</i> than <i>forged</i>, controverted and denied to be law. <i>ibid.</i></p> <p>13 For forgery does not so much consist in counterfeiting the hand and seal, as in endeavouring to give an appearance of truth to a mere deceit and falsity; and by force of such falsity to give it an operation which in justice it ought not to have. 337</p> <p>14 But a man who writes a deed in another's name and seals it in his presence, and <i>by his command</i> is not guilty of this offence. <i>ibid.</i> f. 3</p> <p>15 Neither shall an obligee be punished <i>for forgery</i> who erases the word <i>libris</i> and inserts <i>marcis</i>; for it is alone prejudicial to himself. f. 4</p> |
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FORGERY.

- | | |
|--|---|
| <p>1 Forgery is either by the common law or statute. 335. c. 70</p> <p>2 At common law, it consists in falsely and fraudulently making or altering</p> | <p>any matter <i>of record</i>; or any other <i>authentic</i> matter of <i>a public nature</i>; as a parish register, any deed, or will. <i>Page 335. c. 70. f. 1</i></p> |
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A TABLE OF PRINCIPAL MATTERS.

- 16 But if it should appear that this alteration was to prejudice a third person it is forgery; and otherwise it is a *misdemeanor*. Page 337. f. 4
- 17 To write a will *officiously* is not forgery; although the testator becomes *non compos* before it is brought to him; for it is not writing without privity; but giving an instrument or false appearance, that constitutes forgery. f. 5
- 18 Non seafance, as by leaving a legacy out of a will, is not forgery. f. 6
- 19 But perhaps otherwise if the omission of one bequest cause a material alteration in the limitation of a bequest to another. *ibid.*
- 20 But in this case the first enquiry should be, with what intention the omission was made. *ibid.*
- 21 It is not material whether the forged instrument be made in such a manner that if it were in truth what it is counterfeited for, it would be of validity or not. 338
- 22 All matters of record, from their high public importance, may become the subjects of forgery. *ibid.* f. 8
- 23 So also may a privy seal, a licence from the *exchequer* to compound a debt, a certificate of holy orders, and a protection from a parliament man. f. 9
- 24 It is unquestionable that a man may be guilty at common law by forging a deed; and most probably by forging a will, but this is not settled. f. 10
- 25 It is laid down generally that the counterfeiting other writings of an inferior nature is not properly forgery. f. 11
- 26 As an order on a tenant to receive rent. *ibid.*
- 27 But they are punishable as cheats. *ibid.*
- 28 The distinction is that, the counterfeiting of writings of an *authentic public nature* is in itself criminal whether any third person be actually injured thereby or not; but that the counterfeiting of other writings of an inferior and *private nature* is no crime, unless some one receive a prejudice thereby. 339
- 29 OF FORGERY BY STATUTE. Page 339 f. 12
- 30 By 5 Eliz. c. 14. whoever shall falsely forge any deed, charter or writing sealed, court roll, or the will of any person in writing to the intent that the estate, or freehold, or inheritance, to any lands, tenements, or hereditaments, freehold, or copyhold, or the right, title, or interest of any person therein, shall be molested, &c. or shall knowingly utter the same with the like intent, on conviction, by action of damages to the party grieved, shall pay double costs and damages, be set in the pillory, have his ears cut off, his nostrils slit and *seared*; forfeit all the profits of his lands, and suffer perpetual imprisonment. 339, 340
- 31 But the uttering shall not extend to any attorney, lawyer, or counsellor, who shews such deed in evidence for his client. 339
- 32 And if such forgery be of any charter, deed, or writing, with intent to claim any estate or interest for a term of years in any premises not being copyhold—or any annuity in fee-simple, fee tail, or for term of life or years—or if such forgery be of any obligation, bill obligatory, acquittance, release or discharge of any debt, account, &c. of any thing personal, the offender shall pay double damages, &c. and be set on the pillory as aforesaid, have one of his ears cut off, and suffer imprisonment for one year, &c. 340
- 33 And whoever shall be convicted of any of the said offences a second time, he shall be guilty of felony without benefit of clergy. *ibid.* f. 14
- 34 But this conviction shall not corrupt the blood or bar the descent of lands, or dower, nor extend to the sealing, &c. of such instruments in the spiritual courts. *ibid.* 341
- 35 All justices of oyer and terminer and assize have jurisdiction over this offence. f. 15
- 36 A false customary of a copyhold manor is within the first branch of this act. 341, f. 17

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- 37 So also is a lease for years or a grant of a rent charge for years in the name of one who is seized of a freehold or inheritance. *Page* 341 f. 18
- 38 The second branch of the act means only such forgeries as relate to an estate or interest in *esse* before. 341. f. 18
- 39 A will of one possessed of such estate mentioning a bequest thereof is within the second branch, although the wills are not mentioned. f. 19
- 40 The forgery of a lease of lands in Ireland is not at all within the statute. f. 20
- 41 Nor is a deed containing a gift of mere personal chattels. 342, f. 21
- 42 But a statute merchant, or a recognizance in nature of statute staple, are within the meaning of the word *obligation*—But a statute staple itself is not, for it does not require a seal. f. 22
- 43 To publish a deed, after *information* of its falsity, is an uttering within the act. f. 23
- 44 The double damages (*Vide Supra*. No.) shall be governed by the penalty and not by the true debt appearing in the condition. f. 24
- 45 A second conviction for a forgery of a different nature from the first, will make the offender guilty of the felony. f. 25
- 46 The prosecution must strictly pursue the words of the statute. f. 26
- 47 But an indictment setting forth that the writing was indented without adding it was sealed is sufficient. *ibid.*
- 48 And *super caput suum proprium* is a good legal translation of the words "upon his own head." *ibid.*
- 49 A verdict finding *de transgressionem & forgeria, predictus prout superius indicamento supponitur* is sufficient. 343
- 50 But the legislature have inflicted death, in the first instance, on the crime of forgery in the following cases. *ibid.* (N)
- 51 By 8 & 9 Will. 3. c. 20.—To forge the *common seal* of the bank of England—or any sealed bank bill in the name of the directors—or any bank note whatsoever signed for them—or to erase the indorsement on any bank bill or note. *Page* 204, 205
- 52 And to efface *the red ink mark* usually made upon them when paid, is *erasing* an indorsement within this act. *ibid.* (N)
- 53 So also to alter the amount of the sum is held to be forgery. *ibid.*
- 54 And the cashier *whose name is signed* is an admissible witness to prove the forgery. *ibid.*
- 55 By 11 Geo. 1. c. 9.—To utter or demand the money for any such forged, or altered bank bill or note with intention to defraud is *single felony*. f. 2
- 56 By 12 Geo. 1. c. 32. to forge the name of any of the cashiers to any instrument in writing whatsoever to obtain the property of any of the suitors in chancery, or any person whatsoever, is felony without clergy. f. 3
- 57 By 15 Geo. 2. c. 13. to alter any bank note, bank bill, dividend warrant, bond or obligation under the common seal of the bank, or any indorsement thereon, or to utter the same with intention to defraud any person, is death. f. 4
- 58 By 25 Geo. 3. c. 2. to forge any exchequer bill, before the same shall be paid off and cancelled, or any exchequer bills to be received, or any indorsement thereon, &c. with intent to defraud, &c. is death. 207
- 59 By 9 Geo. 1. c. 12. to forge any exchequer order for the payment of annuities—or the name of any of the proprietors, &c. is felony without clergy. *ibid.* f. 8
- 60 To forge any stamp or mark, ordered to be made by the several stamp acts (*which are enumerated*) on any vellum, parchment, or paper, *with intention to defraud his majesty* is felony without clergy. *ibid.* f. 9
- 61 By 13 Geo. 3. c. 56. to forge the stamp or mark used in making gold and silver plate in pursuance of 12 Geo. 2. c. 26. is transportation for fourteen years. 208

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- 62 But by 24 Geo. 3. c. 53. to commit this offence in the manner therein described, is death without clergy. *Page* 208 f. 10
- 63 One of the marks is a lion *passant*, and if the indictment describe the lion to be *rampant* it is fatal. (N)
- 64 By 24 Geo. 3. c. 20. the manufacturers of Sheffield are exempted from the injunctions of these acts. (N)
- 65 By 13 Geo. 3. c. 56. to forge the stamps on silks, calicoes, linens and stuffs printed in Great Britain is felony without clergy.
- 66 By 14 Geo. 3. c. 72. f. 8. to forge the stamps on printed cottons, is death.
- 67 By 9 Ann. tit. 1. c. 27. f. 51. to forge the common seal of the South Sea company or any bond or obligation under the same, or to utter, &c. is felony without clergy. 208 f. 11
- 68 By 8 Geo. 1. c. 22. to forge any letter of attorney, or other authority to transfer any share of South Sea stock, or to receive any dividends or part thereof—or the name of any of the proprietors, &c. is felony without clergy. 208, 209
- 69 By 25 Geo. 3. c. 57. to forge any lottery orders, &c. is felony without clergy. 209. f. 12, 13
- 70 By 6 Geo. 1. c. 18. and 14 Geo. 2. c. 37. to forge the common seal of the London or Royal Exchange Assurance, or any policy, bill, bond or obligation under the same, &c. is death. 209 f. 14
- 71 By 12 Geo. 1. c. 32. to forge the hand of the accountant general, register, clerk of the report office in chancery, to obtain the money of any of the suitors is death. 210 f. 15
- 72 By 4 Geo. 2. c. 18. to forge a Mediterranean pass, is felony without clergy. 211 f. 17
- 73 By 8 Geo. 2. c. 6. to forge any entry of acknowledgment of any bargainer in bargain and sale in the registry of York whereby the freehold or inheritance shall be molested, incurs the penalties of 5 Eliz. (*Vide Supra.* No.) 211. f. 19
- 74 By 26 Geo. 2. c. 33. to forge any marriage register, or any licence of marriage. *Page* 211, 212
- 75 By 31 Geo. 2. c. 10. to forge any letter of attorney, bill, ticket, certificate, assignment, last will, or any other power or authority whatsoever in order to receive the monies or wages due to any seamen, &c. is death without clergy. 212
- 76 By 9 Geo. 3. c. 30. to utter the same with intention to defraud any person whatsoever is felony without clergy. 212
- 77 By 31 Geo. 2. c. 22. & 4 Geo. 3. c. 25. to forge any letter of attorney, or other authority or instrument to transfer, sell, assign or convey any share of any capital stock or funds—or to receive any dividend attending such share—or any annuity—or shall forge the name of any proprietor, &c. he shall suffer death without clergy. 212, 213
- 78 By 32 Geo. 2. c. 14. to forge the mark or hand of the receiver of the post fines is death *sans* clergy. 213
- 79 By 4 Geo. 3. c. c. 24. to counterfeit the *frank* upon any letter is transportation 7 years. *ibid.* f. 25
- 80 By 2 Geo. 2. c. 25. to forge, &c. any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for the payment of money, indorsement or assignment thereon, or any acquittance or receipt either for money or goods, with intention to defraud any person, or by 31 Geo. 2. c. 22. any corporation, or shall utter, &c. is felony without clergy. 210 f. 16
- 81 By 7 Geo. 2. c. 22. to forge, &c. any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for the payment of money or delivery of goods with intention to defraud any person, or by 18 Geo. 3. c. 18. any corporation, is death without clergy. 211 f. 18
- 82 Forgery may be committed in the name of a person who never had existence. 210 (N) 1

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Coke's definition of forgery *supra.* (No.) is too narrow. *Page*

201

person finds a promissory note, forges it in a fictitious name or to get it discounted—this is *ibid.*

Forgery perfect similitude is not necessary, if made with an aptness to it, it is sufficient. (N)

Water mark is not essentially necessary in a forgery of a bank note.

ibid.

“follows” is a sufficient averment that the tenor of a forged receipt is set out. (N) 3

only necessary to aver a general intent to defraud, without setting out the particular manner in which fraud was to take effect. *ibid.*

Forgery of a will it is not necessary to charge it “the last will” “a writing purporting to be the last will” is sufficient. *ibid.*

Species of “order for the receipt of money or the delivery of goods” may be the subject of forgery. 211 (N) 4

Evidence is necessary to prove forgery of a bill of exchange, &c. 213 (N)

FORNICATION.

Concubinage, grossly scandalous, punishable by the temporal judges, and imprisonment, &c. 10

Vide Bawdy-houses.

ST.—*Vide Fern. Black Act. Deer Hunters.*

Passers in any forest, &c. will render themselves to the keepers, may be slain by force of the statute *malefactoribus in parvis.* 107

f. 15

UNE-TELLERS.—*Vide Vagrants.*

Geo. 2. c. 5. whoever shall undertake to tell fortunes, or pretend

by crafty science, to discover stolen goods, shall be imprisoned for one year, stand four times in the pillory, and find surety as the court shall think fit. *Page* 9

2 By 17 Geo. 2. c. 5. all jugglers, fortune-tellers, &c. &c. shall be deemed rogues and vagabonds. *ibid.*

FOSSILS.—*Vide Highways.*

FOXES.—*Vide Larceny.*

FRAUDS. *Vide Cheats. Deceit. Permits.*

FREEHOLD.

1 The goods of which larceny may be committed, ought to be no way annexed to the freehold. 141 f. 21

2 Therefore it is no larceny at common law to steal corn or grass growing, or apples on a tree, or lead on a church. *ibid.*

3 But by 43 Eliz. c. 7. to cut corn or grain growing, to rob orchards, to break the fences or trees therein, to the intent to take the same away, or to cut woods, underwoods, poles, &c. *not being felony by the laws of this realm,* is made punishable at discretion. 214

4 By 15 Car. 2. c. 2. the houses of such offenders may be searched. *ibid.*

5 By 1 Geo. 1. c. 48. to destroy any timber or fruit tree, is fine and imprisonment. *ibid.*

6 By 6 Geo. 1. c. 16. to destroy any wood sprigs, trees, poles, thorns, quicksets, &c. is liable to the same punishment. 215

7 By 9 Geo. 1. c. 22. to destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit, is felony without clergy. f. 4

8 By 6 Geo. 3. 36. whoever, in the night, shall damage or destroy any timber, tree, &c. or any shrub or plant, of the value of 5s. &c. &c. shall be transported seven years. f. 5

9 B.

A TABLE OF PRINCIPAL MATTERS

9 By 6 Geo. 3. c. 48. whoever shall deface or damage any timber tree, in any of the king's forests, shall forfeit 20*l*. &c. for the first offence; thirty pounds, &c. for the second; and for the third, be transported for seven years. *Page* 216

10 And whoever shall cut or destroy any shrub, root, or plant, in any cultivated lands, shall forfeit, not exceeding, 40*l*. for the first offence; 5*l*. for the second; and for the third he may be transported for seven years. *ibid.*

11 By 13 Geo. 3. c. 32. whoever shall steal or destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots, growing in any garden: or by 31 Geo. 2. c. 35. any madder roots, shall forfeit 10*l*. *217 f. 11*

12 By 25 Geo. 2. c. 10. whoever shall break into a black lead mine, or being there, shall steal any lead, cawke, &c. may be transported for seven years. *218*

13 By 4 Geo. 2. c. 32. and 21 Geo. 3. c. 68. whoever shall break, with intent to steal any lead, iron bar, iron grate, iron pallisadoes, or iron rail; or any copper, brass, or bell-metal utensil, or fixture, being fixed to any dwelling-house, &c. &c. he may be transported for seven years. *218, 219*

F R E G I T.—*Vide Burglary.*

FRENCH KING.—*Vide Foreign Prince.*

FRUIT.—*Vide Freehold. Larceny.*

1 By what measure it shall be sold. *522 f. 120*

2 The duty on apples and pears. *f. 121*

F U N D S.—*Vide Forgery.*

F U R Z E.—*Vide Fern.*

G.

G A M I N G.

1 **A** L L common gaming-houses are indictable as nuisances. *Page* 362 *f. 6*

2 By 10 & 11 Will. 3. c. 17. all mischievous games, called lotteries, by (*inter alia*) dice, lots, cards, &c. are declared nuisances, and whoever shall keep such lottery, shall forfeit 500*l*. &c. *364*

3 By 9 Ann. c. 14. *f. 8.* to assault and beat any person on account of monies, won by gaming is forfeiture of goods, and two years imprisonment. *264, 265, 266*

4 By 16 Car. 2. c. 7. to use any fraud or unlawful device, in playing at any pastime or game, or by bearing a share in the stakes, or by betting on the side of such as shall play, incurs a forfeiture of treble the value. *345*

5 By 9 Ann. c. 14. if any person shall by any fraud or theft, deceit, ill practice, &c. in playing at any of the games mentioned in the act, or by bearing stakes, or by betting, &c. won any sum of money, or other valuable thing, on conviction, by information or indictment, he shall forfeit five times the value, be deemed infamous, and suffer corporal punishment, as in cases of perjury. *345 f. 9*

G A O L E R.

1 To threaten or assault a gaoler for keeping a prisoner in safe custody, is a contempt of the law, and highly punishable by fine and imprisonment. *90 f. 14*

2 If a criminal, in endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. *107 f. 13*

3 If a gaoler, by *duress* of imprisonment, compel a man to accuse an innocent person, who, on his evidence, is condemned and executed, this is homicide in the gaoler. *118 f. 7*

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- 4 A gaoler knowing a prisoner to be infected with an epidemical distemper, confines another prisoner against his will, in the same room with him, by which he catches the infection, and is suffered to continue there and die, this is a felonious killing. *P. 119 (N)*
- 5 So also, to confine a prisoner in a damp room, denying him the conveniences which decency requires, by which filth he catches a distemper and dies, it is felonious. *ibid.*
- 6 Gaolers are not to behave with wanton cruelty to their prisoners. *ibid.*
- 7 By 14 Ed. 3. c. 10. if any gaoler, or under-keeper, by duress, make any prisoner to become an appeller, against his will, he is guilty of felony. *194*
- 8 It is immaterial whether the approvement be true or false, or whether the appellee be acquitted or condemned. *ibid.*
- 9 An enumeration of all the statutes relating to gaolers, with the substance of the subjects of them. *ibid. (N)*
- 10 How a gaoler should be punished for misusing his prisoner. *311 f. 2*

G A R D E N S.

- 1 By 43 Eliz. c. 10. to rob any orchard or garden; to break the fences therein; or to dig or take up any fruit tree, on conviction, by one witness, before one magistrate, the offender shall make compensation, or be publicly whipped. *214*
- 2 By 1 Geo. 1. c. 48. whoever shall destroy any fruit tree, shall be confined to hard labour for three months, &c. &c. *ibid.*
- 3 By 9 Geo. 1. c. 22. whoever shall destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit; or shall rescue any offender, or procure any person to commit such offence, he shall suffer death without clergy. *215*
- 4 By 6 Geo. 3. c. 36. whoever, in the night time, shall pluck up or destroy any root, shrub, or plant, of the va-

lue of 5*s.* growing, or being in a garden ground, nursery, or other inclosed ground, their aiders, &c. shall be transported for seven years. *Page 215*

- 5 By 6 Geo. 3. c. 48. whoever shall pluck up or destroy any root, shrub, or plant, out of any field, nursery, garden, or garden grounds, or other cultivated lands, shall forfeit, not exceeding, 40*s.* for the first offence; not above 5*l.* for the second; and for the third suffer transportation seven years. *216*
- 6 By 13 Geo. 3. c. 32. whoever shall steal, or maliciously destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots, or by 31 Geo. 2. c. 35. any madder roots, growing or being in any garden, or lands, on conviction by one witness, before one justice, within 30 days, shall forfeit, not exceeding 10*s.* and the value of the things taken or destroyed, &c. &c. *217*
- 7 By 4 Geo. 2. c. 32. to rip, with intent to steal, any lead, iron bar, iron grate, iron palisade, or iron rail, whatsoever, or by 21 Geo. 3. c. 68. any copper, brats, bell-metal utensil, or fixture, being in any garden, orchard, court, yard, fence, or outlet belonging to any dwelling-house or other building, their aiders, &c. or shall buy or receive the same, shall be guilty of felony, and may be transported for seven years, or imprisoned for one year, and whipped three times, &c. *218, 219*
- 1 By 6 Geo. 1. c. 23. to assault any person in the public highway with intent to spoil their cloaths or garments is transportation for seven years. *238*
- 2 If the assault therefore is made in the playhouses or other building it is not within the act. *Fiddings penal Laws.*

G A R M E N T S.

G A T E.—*Vide Fences.*

- 1 Erecting a new gate in a highway is a nuisance because it intercepts that tree

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free, open, and legal passage, the people before enjoyed. *Page* 362 f. 9.

404 f. 50

2 But where a gate has continued time out of mind it shall be intended that it was set up at first by consent, or laying out the road, in which case the people never had a free passage. 363

3 A gate that is a common nuisance may be pulled down by any person.

364 f. 12

4 By 6 Geo. 1. whoever shall break down the gates, &c. of such places as the act describes shall be committed to the house of correction, &c. 192 f. 2

5 The punishment for destroying turnpike gates. 192, 193

GAZETTE.—*Vide Smuggling. Quarantine.*

GENERAL ISSUE.

1 May be pleaded on the statute 19 Geo. 2. c. 21. against profane cursing and swearing. 12 f. 4

2 On 13 Geo. 3. c. 78. for regulating highways. 420

3 On 13 Geo. 3. c. 84. for turnpike roads. 442

4 On 9 & 10 Will. 3. c. 7. concerning squibbs. 224

5 On 9 & 10 Will. 3. c. 41. against embezzling naval stores. 562

6 On 6 Ann. c. 31. for preventing fire. 197

7 On 30 Geo. 2. c. 24. against gaming. 469

8 On 17 Geo. 2. c. 5. of vagrants. 576

9 On 29 Geo. 2. c. 30. for stealing iron. 232

10 On 31 Geo. 2. c. 29 & 40. bread. 486 f. 5

11 On 31 Geo. 2. c. 40. hay. 521 f. 116

GESTURES.—*Vide Manslaughter.*

1 No affront by bare words or gesture, however false, malicious, or aggra-

vated, is sufficient provocation to excuse from the guilt of murder. *Page* 124 f. 33

GOD.—*Vide Religion. Lord's Day. Common Prayer.*

1 All blasphemies against God, as denying his being or providence, or reproaching Jesus CHRIST; or falsely pretending to extraordinary commissions from God are high offences, by the common law, punishable with fine, imprisonment, and such infamous corporal punishment as the court shall direct. 10 c. 5

2 By 9 & 10 Will. 3. c. 32. denying any one of the persons in the holy Trinity to be God, or maintaining that there are more gods than one, &c. on conviction, at Westminster or assizes, renders the offender incapable of any office for the first—disabled to sue, &c. for the second offence: 7 f. 11

GOLD.—*Vide Coin.*

1 The king by his prerogative is intitled to all gold mines. 70

2 Endeavours to find out the *Philosophers stone* being found prejudicial, the 5 Hen. 4. c. 4. made it felony to use the craft of multiplication, but is repealed by 1 W. & M. c. 30. 73, 74

3 By 8 & 9 Will. 3. c. 26. whoever shall blanch copper, &c. or deal in any malleable composition or mixture of metals, which shall be heavier, and look and touch like standard gold he shall be guilty of felony. 71 f. 2

4 The standard of gold consists in two carrats of copper melted with 22 carrats of fine gold. 70 (N) 1

5 The king cannot by his prerogative alter the standard. *ibid.*

GOLDSMITH.—*Vide Bullion.*

1 By 6 & 7 Will. 3. c. 17. no molten silver shall be stamped unless it be marked and stamped at Goldsmith's Hall

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- Hall, and certified under the hand of one of the wardens of the goldsmiths that oath had been made by the owner and one credible witness that no part thereof was the current coin of the kingdom, nor the clippings thereof, nor plate, &c. *Page 72, 73*
- 2 No braker not being a trading goldsmith or refiner of silver shall buy or sell any bullion on pain of six months imprisonment. *73 f. 9*

GOODS.—*Vide Stolen Goods. Usury.*

GOOD BEHAVIOUR.—*Vide Behaviour. Surety. Recognizance.*

- 1 By 34 Edw. 3. c. 1. justices of peace are empowered to restrain offenders, rioters, &c. and to take and arrest all those they found by indictment or suspicion, and put them in prison—and to take of all them that be not of good fame sufficient surety and mainprize for their good behaviour. *261*
- 2 Persons of evil fame includes persons of scandalous behaviour in other respects than those relating to the peace. *ibid. f. 2*
- 3 A man may be bound to good behaviour for offences *contra bonos mores*, as haunting bawdy houses with women of bad fame, keeping bad women in one's house; speaking contemptuously of a justice or a mayor, though not in the execution of office, and also of a constable in the execution of his office. *ibid.*
- 4 But no one ought to be bound to good behaviour for rash, quarrelsome, or unmannerly words, unless they tend to break the peace, or abuse the government. *ibid. f. 3*
- 5 But there are no precise rules and the magistrate has a discretionary power. *262*
- 6 Surety may be taken of all he may justly suspect to be dangerous, quarrelsome or scandalous, as those who sleep in the day and wake in the night; or keep suspicious company, reputed robbers, &c. caves drop-

- pers, common drunkards; and all persons whose conduct renders them of evil fame. *Page 262*
- 7 A variety of instances enumerated in which surety for behaviour has been taken. *ibid. (N) 1*
- 8 By 1 Mary st. 2. c. 3. it may be required of persons convicted of disturbing divine service. *309*
- 9 By 5 Eliz. c. 21, 22 & 23 Car. 2. c. 25. for offences against the game laws. *187*
- 10 By 43 Eliz. c. 23. for entertaining outlawed felons.
- 11 By 1 Jac. 1. c. 31. for going abroad infected with the plague. *241*
- 12 By 3 Jac. 1. c. 13.—5 Geo. 1. c. 15. for unlawfully hunting in parks. *187*
- 13 By 4 Jac. 1. c. 5. & 21 Jac. 1. c. 7. on conviction a second time for drunkenness. *466*
- 14 By 1 Will. & M. c. 8. for refusing to take the oaths. *97, 98*
- 15 By 5 Will. & Mary, c. 13. of felons after pardon.
- 16 By 9 Ann. c. 14. of persons unlawfully gaming. *266*
- 17 By 1 Geo. 1. c. 21. disorders in dock yards.
- 18 By 1 Geo. 1. c. 48. destroying timber. *214 f. 2*
- 19 By 9 Geo. 2. c. 5. pretending witchcraft. *9*
- 20 By 8 Geo. 2. c. 20. turnpikes. *193*
- 21 By 9 Geo. 2. c. 35. affixing in running goods. *227*

GOVERNMENT.

- 1 All contempts against the king's government are criminal and punishable with fine, imprisonment and sometimes pillory at the discretion of the court. *92 c. 23*
- 2 As charging the government with oppression or weak administration. *f. 1*
- 3 Or doing an act which impliedly encourages rebellion. *f. 2*
- 4 Endeavouring to change the measures of government by alarming the king's mind. *f. 3*
- 5 See read-

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- 5 Spreading false rumours respecting the government. *P. 92. c. 23. f. 4*
- 6 Charging the king with a breach of his coronation oath. *f. 5*
- 7 Doing any thing which may weaken the government. *93 f. 6*
- 8 And it is said that to refuse in a foreign part to pay the usual custom is a contempt of government for which a man may be indicted. *f. 7*
- 9 The public peace is the end of all government. *94*

GRADUATED STONES. — *Vide Highways.*

GRAMMAR SCHOOL.

- 1 By 1 Jac. 1. c. 4. no person shall keep any school or be a school-master out of the universities or colleges of this realm except it be in some public or free grammar school, &c. on pain of 40s. *18 f. 2*

GRAIN.—*Vide Granary. Bread.*

GRANARY.

- 1 By 11 Geo. 2. c. 22. whoever shall destroy any storehouse, granary, or other place where corn shall be then kept in order to be exported; or shall unlawfully enter any such place and take and carry away any corn, flour, meal or grain therefrom or shall throw abroad or spoil the same, shall be transported for seven years. *243 f. 2*
- 2 The hundred liable to the amount of 100l. *244*

GRAND JURY.

- 1 The grand jury cannot find a bill true for part, and false for part, as petty jury may. *286*
- 2 But an indictment of *two counts* one for a riot, indorsed by the jury *ignoramus*, the other for an assault re-

turned *billa vera*, is good.—*R. v. Fieldhouse.* *Page 286*

- 3 The court may impose an immediate fine on a person who refuses to give evidence before the grand jury concerning a crime. *91 f. 4*

GRAND LARCENY.—*Vide Larceny.*

- 1 Grand larceny is a felonious and fraudulent *taking and carrying away*, the mere personal goods of another not from the person, nor out of his house, above the value of 12d. *134*

GRANT.—*Vide Monopoly. Gunpowder.*

- 1 On a forfeiture of goods for "absence from church" the king cannot grant the goods over, till inquisition found. *29 f. 46*
 - 2 All grants of monopolies relating to any known trade are void by the common law. *470 f. 1*
 - 3 By the common law the king's grant to any particular corporation of the sole importation of any merchandize is void. *470, 471*
 - 4 The grant of the sole ingrossing of wills, and inventories in a spiritual court, or of the sole making of bills, pleas, and writs in a court of law to any particular person, is void. *470 f. 4*
 - 5 A grant for the sole making, importing, and selling of playing-cards, is void. *f. 5*
 - 6 Nothing can exclude a subject from trade, but an act of parliament. (N)
 - 7 But the king may grant to any one the sole use of any art invented, or first brought into the realm by the grantee. *f. 6*
 - 8 The king may grant to particular persons the sole use of some particular employments; as printing the holy scriptures, law-books, &c. *ibid.*
 - 9 By 21 Jac. 1. c. 3. all grants of monopolies are declared void. *472*
 - 10 All persons disabled to sue them. *f. 9*
- 11 And*

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- 24 And the force and validity of such grants shall be heard and determined by the common law. *Page* 472 f. 10
- 12 How persons aggrieved by such grants shall be relieved. 472, 473
- 13 But this statute shall not extend to grants of privilege, for the term of fourteen years, for the sole working or making of any new manufacture, within this realm, to the true and first inventors. *ibid.* f. 14
- 14 Manufactures newly brought into the realm, are within this grant of privilege. *ibid.*
- 15 But it is provided that such grants shall not be contrary to law, nor mischievous to the state, &c. *ibid.*
- 16 Nor shall they, in any wise prejudice the grants, to corporations or companies, &c. 474 f. 19
- 17 Sandry other exceptions out of this statute. f. 20, 22
- 5 Nor is any alteration of the matter of an instrument, to which the seal is affixed, a counterfeiting of it. *Page* 61 f. 52
- 6 By 7 Ann. c. 21. to counterfeit the seals used in Scotland is high treason. *ibid.*

GROUSE.—*Vide Fern.*

GRUDGE.—*Vide Homicide.*

- 1 If two persons fight, on malice, are reconciled, and after fight again, it shall not be presumed that they fought upon the old grudge. 124 f. 38

GUAGE R.—*Vide Public-House.*

GUEST.

- 1 A guest who has a piece of plate set before him in an inn, may be guilty of felony in fraudulently taking it away. 136 f. 6
- 2 If an inn-keeper refuse either to receive a traveller, as a guest, into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he may be sued by action for damages, and also indicted and fined at the suit of the king. 452 f. 2
- 3 And it is said that the constable may compel him to receive such guest. *ibid.*

GUDGEONS.—*Vide Fish.*

- 1 The usual nets for taking them may be used, provided they are not used for fish prohibited to be taken by such nets. 517

GUILT.—*Vide Infant. Lunatic. Feme Covert.*

- 1 Those who, from weakness or infirmity of mind, are incapable of understanding what the law is; and those who,

GRASS.

- 1 It is no larceny, by the common law, to steal corn or grass growing, but a bare trespass. 143

GRAVERS.—*Vide Engravings.*

GRAVESEND.

- 1 For the offence of surcharging boats, passing and navigated between Gravesend and Windsor. 569

GREAT SEAL.

- 1 By 23 Ed. 3. c. 2. if a man do counterfeit the king's great or privy seal, he shall be guilty of high treason. 61 f. 40
- 2 This extends to aiders and consenters as well as to actors. f. 49
- 3 But no attempt to counterfeit either of them, will amount to this crime. f. 50
- 4 Nor is fixing the great seal to a patent, without a warrant for so doing, high treason. f. 51

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who, from their subjection to the power of others, are incapable of conforming to its dictates, shall not be found guilty for their disobedience.

Page 1

- 2 But a voluntary cause of disobedience, as drunkenness, will not excuse the guilt of an offender. 3 f. 6
- 3 Casualty and misfortune are exemptions from guilt. 5 (N)
- 4 So also are ignorance and mistake, compulsion and necessity. *ibid.*
But every offender must prove these exemptions, unless they arise from the evidence against him. *ibid.*

GUINEA.—*Vide Coin.*

- 1 The impression of a guinea being made on a piece of hammered gold, not round, and in an impassable state, is not a counterfeiting of the current coin. 62 f. 55 (N) 13
- 2 By 15 Geo. 2. c. 28. to wash, gild, or colour any lawful or counterfeit shilling, or a sixpence, or add to, or alter the impression of either side of such shilling or sixpence, with intent to make the same resemble, or look like, or pass for a guinea or a half guinea, or to aid or counsel therein, &c. is high treason. 65 f. 64

GUINEA PEPPER.—*Vide Ale and Beer, No. 4.*

GUN-POWDER.

- 1 By 21 Jac. 1. c. 3. against grants of monopolies, it shall not extend to grants concerning digging, making or compounding of saltpetre, or gunpowder, &c. 474, 475
- 2 By 16 Car. 1. c. 21. all persons may import, make, and sell gunpowder, or the materials thereof, notwithstanding any inhibition. 475

GUN.

- 1 To fire a gun among a multitude of people, is evidence of a felonious in-

tent, and, if death ensue, it will be murder. *Page 113 f. 12*

GYPSIES.—*Vide Egyptians.*

H.

HABEAS CORPUS.

- 1 A man committed by the spiritual court, for heresy, may sue out a *Habeas Corpus* to the King's Bench. 6 f. 7

HABIT.

- 1 By 5 Geo. 1. c. 4. if any mayor, bailiff, or other magistrate, shall wilfully resort to any other place of divine worship than the church, in the gown or any other peculiar habit of his office, &c. &c. he shall be disabled. 17, 18

HABITATION.—*Vide House. Burglary. Arson. Affray.*

HACKNEY COACHMEN.

- 1 By 9 Ann. c. 23. hackney coachmen are permitted to work within the bills of mortality on a Sunday. 18

HALFPENNY.

- 1 By 15 Geo. 2. c. 28. whoever shall counterfeit a halfpenny or farthing, their aiders, &c. shall suffer two years imprisonment, and find surety for two years more. 71, 72
- 2 By 11 Geo. 3. c. 40. whoever shall coin a halfpenny or a farthing, his aiders, &c. shall be guilty of felony. 72
- 3 By 15 Geo. 3. c. 28. to file, wash, or colour; or to add to, or alter the impression of a halfpenny or farthing.

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farthing, with an intent to make them look like, or pass, for either a sixpence or a shilling, or to aid, &c. is high treason. *Page 65 f. 64*

HAND.—*Vide Maim. Finger.*

HARES.—*Vide Lord's Day. Black AB. Hunters.*

HARBOUR. *Vide Jesuit. Church.*

- 1 By 3 Jac. 1. c. 4. whoever shall harbour, in his house, any servant, sojourner, or stranger, &c. who shall not go to church, &c. shall forfeit 10*l.* a month. *31 c. 11*

H A W K S.

- 1 Hawks reclaimed may be the subject of larceny, not only at common law, in respect of the great value of this bird, but by force of 37 Ed. 3. c. 19. *143 f. 23*
- 2 But the dealer must know them to be reclaimed. *ibid.*
- 3 For not possessing *animus revertendi*, they are to be considered *feræ naturæ*, and therefore common property. *144 f. 26*
- 4 So also it seems felony to steal the eggs or the young of reclaimed hawks, *sed quere.* But the 1 Hen. 7. c. 17. has appointed a less punishment to this offence. *f. 27*

H A Y and S T R A W.

- 1 By 2 W. & M. c. 8. every truss of old hay, for sale within the bills of mortality, between 1*st.* August and June, shall weigh 56 lb. and new hay from June to August, 60 lb. on pain of 16*d.* a truss. *521 f. 115*
- 2 By 31 Geo. 2. c. 40. all straw within the bills of mortality, shall be sold in bundles weighing 36 lb. on

pain of 1*s.* for every bundle deficient. *Page 521 f. 116*

- 3 And every truss of hay shall be found and good, and both the bands not exceed the weight of 5 lb. on pain of 3*d.* for every bundle. *f. 117*
- 4 No salesman shall buy hay or straw on his own account, other than for his own consumption, on pain of 1*s.* for every truss. *f. 118*

HEALTH.—*Vide Quarantine.*

H E A R I N G M A S S.

- 1 By 23 Eliz. c. 1. every person who shall say or sing mass, shall forfeit 200 marks, &c. And every person who shall hear mass 100 marks, &c. *39 c. 13.*
- 2 By 11 & 12 Will. 3. c. 4. whoever shall apprehend a popish priest, and convict him for saying mass, shall receive 100*l.* *f. 2*
- 3 But by 18 Geo. 3. c. 60 the penalty is repealed, provided the party take the oath there enjoined. *f. 3*

HEDGE STEALING.—*Vide Freehold.*

HEIFER.—*Vide Cattle.*

H E I R.

- 1 By 1 Jac 1. c. 4. the heir, if he be no recusant, or if he be such, and conforms, shall be freed from all penalties incurred by his ancestor's recusancy, unless two parts of the lands were seized by the king in the ancestor's life, and then they shall so continue till the whole debt be levied; but he shall not extend the other third part of the lands. *30 f. 55*
- 2 The heir has no remedy but conforming to free his fee-simple lands, whether seized in the ancestor's life or not. *f. 56*

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- 3 But his lands in fee tail, from such his ancestors, are not chargeable on a conviction of such ancestor by proclamation. *Page 30 f. 56*
- 4 On a conviction by judgment, they are chargeable by force, 33 Hen. 8. c. 9. *ibid.*
- 5 But the above opinions seem questionable. *ibid.*
- 6 Perhaps an heir tail is chargeable only with the forfeitures of those months which are contained in the indictment, and not for the months subsequent to the conviction. 31
- 7 The heir apparent may maintain his ancestor. 538 f. 14 & 15
- 8 The son of a queen regnant is included under the words, "eldest son and heir," in the statute of treasons; and also the second son after the death of the first; but a collateral heir is not. 53 f. 22 (N) 2
- 6 Every bishop, in his diocese, may convict and proceed by church censures. *Page 6 f. 4*
- 7 But no other spiritual judges can. *ibid.*
- 8 For a conviction before the ordinary would not warrant the writ *de heretico comburendo*. *ibid.*
- 9 By 24 Hen. 8. c. 9. the archbishop of either province may cite any person before him for heresy, if the immediate ordinary consents, or if he neglect his duty in punishing the same. f. 35
- 10 Proceedings cannot be had, at common law, in the temporal courts, merely for heresy. f. 6
- 11 If the public peace will probably be disturbed by the mode of maintaining the errors of heresy, the offender may be indicted. *ibid.*
- 12 A temporal judge may incidentally take notice of heresy. f. 7
- 13 As on a habeas corpus, or an action for false imprisonment. *ibid.*
- 14 Certain assertions adjudged not heresy. *ibid.*
- 15 In *quare impedit* if the bishop plead that he refused the clerk for heresy, he must set forth the particular point. 6, 7
- 16 A temporal court having cognisance of the original cause, may decide whatever is incidental, &c. 7
- 17 In heresy, the appeal must be to a higher spiritual tribunal: the party aggrieved cannot apply for a prohibition. f. 9
- 18 How heresy was anciently punished. f. 10
- 19 The writ *de heretico comburendo* abolished. *ibid.*
- 20 It did not incur a forfeiture of either land or goods. *ibid.*
- 21 All the statutes authorising forfeiture or imprisonment for heresy, are repealed. f. 11
- 22 Yet now a heretic may be taken up on *excommunicato capiendo*. *ibid.*
- 23 By 9 & 110 W. 3. c. 32. denying any of the persons in the Trinity to be God; maintaining there are more gods than one; denying the truth of Christianity)

HEIRESS.—*Vide Marriage.*

- 1 The punishment of stealing an heiress. 171, 172

HELPING to STOLEN GOODS.— *Vide stolen Goods.*

HERESY.

- 1 Heresy, among protestants, is a false opinion repugnant to some of the essential doctrines of revealed religion. 5 c. 2
- 2 The particular errors called heresy, are intricate and innumerable. 6
- 3 The restraints upon the high commission court, that no points should be adjudged heretical, but those so determined either by scripture, some of the general councils, or parliament, are good guides to the spiritual courts. *ibid.*
- 4 The convocation may declare what opinions are heretical. 6 f. 3
- 5 But it is questionable if they can convene and convict a heretic. *ibid.*

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Christianity; or the divinity of the scriptures, renders the offender incapable in law, &c. &c. and liable to three years imprisonment. P. 7 f. 11

HÆRETICO COMBURENDO.

- 1 Formerly hereticks were burnt by force of this writ. 7 f. 10
- 2 But by 29 Car. 2. c. 9. this writ is abolished. f. 11
- 3 Witches anciently burnt by force of this writ. 8 f. 2

HIDES.—*Vide Slaughter House.*

- 1 By 26 Geo. 3. c. 71. to disfigure any hide, &c. at any slaughtering house, authorised by this act, without a certificate, or before notice to the inspector, is a misdemeanor. 181 f. 13

HIGGLER.

- 1 Not permitted to travel on a Sunday. 11, 12

HIGH SEAS.—*Vide Piracy.*

HIGH TREASON.—*Vide Treason.*

HIGHWAYS.—*Vide Turnpike Roads.*

- 1 HIGHWAYS are either foot ways, park ways, or court ways, &c. 366
- 2 A common river is a public highway. f. 1
- 3 A horse causeway is a highway. *ibid.*
- 4 A thoroughfare is a highway. *ibid.*
- 5 Every way common to all subjects from town to town is a public highway. *ibid.*
- 6 But a way to a parish church or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, is a private way and not a highway. 367
- 7 The building of a street is a dedication of the highway to the public; but the soil still remains in the owner. *ibid.* (N) 1

8 If a highway through an open field be impassable, the people may go by outlets; even over corn sowed thereon. Page 367 f. 2

9 The grantee of a way may remove obstructions therein. *ibid.* (N) 2

10 But he cannot dig trenches to let off water from the way, which the grantor has caused; for he has no interest in the soil. *ibid.*

11 But he may have an action for spoiling the way; and perhaps may go on an outlet of the wrongdoer. *ibid.*

12 If a private way be spoiled by the grantee, he shall repair it, and not the grantor, unless the grantor has bound himself so to do. *ibid.*

13 An ancient highway cannot be changed without an *ad quod damnum* and inquisition thereof. £ 3

14 A way changed without such authority may be stopped up. *ibid.*

16 And trespass will lie for going on such new way. *ibid.*

17 Neither are inhabitants bound to watch, answer for robbing in, or to repair such new road. *ibid.*

18 But if a river change its course, the highway continues in the new channel, in the same manner as in the old. 368

19 The owner of land through which a road runs is obliged to repair unless he incloses. (N) 3

20 But not a road changed by *ad quod damnum*, except the jury impose such obligation upon the person who brings it. *ibid.*

21 The same consequences also result from the power given by statute, to commissioners. *ibid.*

22 Generally the occupiers of lands are bound to repair the highways in the parish where such lands lie. f. 5

23 But the tenants whose lands adjoin the road, are bound to scour their ditches. *ibid.*

24 Private persons may be burthened to repair highways either in respect to the occupation of lands; or by prescription. *ibid.*

25 In respect to lands; as where the owner incloses the lands through which the highway lies. f. 6

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- 26 And if the adjoining lands belong to several owners, each are equally obliged to repair. *Page 368 f. 7*
- 27 But if the owner throws down the inclosure, he is thereby released from the burthen of repair. 369
- 28 In an *ad quod damnum* the parishioners shall repair the new road. (N) 4
- 29 But another parish, who gain no benefit from the change of the road shall not repair, although it goes through part of such parish; but the person suing out the writ and his heirs shall repair such part of the road. *ibid.*
- 30 A corporation may be bound to repair by force of a general prescription. f. 8
- 31 Nor is it any excuse that they did use to repair it *out of charity*. *ibid.*
- 32 But a private person cannot be bound by a general prescription. *ibid.*
- 33 A tenant in fee may be bound *ratione tenuræ*. *ibid.*
- 34 A tenant at will may be indicted for suffering a house on the highway to grow ruinous. *ibid.*
- 35 But if the parish be indicted, where a particular person is bound, either by tenure or prescription, they cannot discharge themselves under the general issue, but must plead it specially. *ibid.* f. 9
- 36 A parish in two counties; the indictment may be against that part only where the highway lies. (N) 5
- 37 But an indictment against a particular division of a parish, must shew how such division are bound to repair. *ibid.*
- 38 Of HIGHWAYS BY STATUTE, 13 Geo. 3. c. 78. 370
- 39 Occupiers of 50*l.* a year keeping a team of three horses, shall send the same to do statute duty for six days in every year. *ibid.*
- 40 And so for another six days in every year, for every 50*l.* a year which he shall occupy over and above the said 50*l.* *ibid.*
- 41 So also every person who shall occupy 50*l.* in any other parish than that in which he resides. *ibid.*
- 42 So also every person occupying 50*l.* a year, but not keeping a team, shall send a team, &c. *Page 370*
- 43 Persons, not keeping a team, but occupying under 50*l.* a year, either where he does or does not reside, shall pay to the surveyor within ten days in lieu of the duty, for every 20*s.* a year, he shall occupy, one penny for every day's duty, &c. 371
- 44 Persons keeping a team and not occupying 30*l.* a year shall only send one man with their teams.
- 45 Whoever shall keep a cart and horse, and not a team, shall send the same and one labourer, or pay composition as aforesaid, at the option of the surveyor. 372
- 46 Persons above eighteen and under sixty years of age not occupying 4*l.* a year; not being apprentices or menial servants, if they have not otherwise performed or committed shall by themselves or by deputy perform the six days duty. *ibid.*
- 47 Whoever shall keep a coach or other carriage, and not a team, nor occupy 50*l.* a year shall pay one shilling for every days statute duty, for every horse drawn in such carriage; or the composition as aforesaid; at the option of the surveyor.
- * 47 If the carriages required are not necessary; the owners shall send three men or pay 4*s.* 6*d.* in lieu thereof. *ibid.*
- 48 The labourers shall furnish themselves with proper instruments for the statute labour, and shall, with the teams and carriages, work eight hours a day. *ibid.*
- 49 If persons do not send a sufficient labourer, besides the driver, or if they shall disobey the surveyor he may discharge them and recover the forfeiture from the owner, as if the same had not been sent. 373
- 50 A stand cart and one horse to be accounted half a team; every cart and two horses as two thirds of a team. *ibid.*
- 51 If the duty require it, the surveyor may order it to be performed with a wagon. *ibid.*

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- 52 The surveyor shall give four days' notice to the occupiers, &c. when and what statute duty is required. *Page 373*
- 53 Default in sending the carriage, team and men forfeit 10*s.* for every cart with one horse and one man, 3*s.* every cart with one horse and two men 5*s.* every labourer 1*s.* 6*d.* 374
- 54 The forfeitures to be applied to the highways. The surveyor to be impartial. *ibid.*
- 55 But the statute duty may be compounded as the justices shall direct, not exceeding the rates mentioned in the statute. 374
- 56 But if a necessity should arise in any particular place, the justices may supersede the liberty of compounding and order the statute duty to be performed in kind; and lots shall be drawn which of the inhabitants shall so perform it. 375
- 57 The justices may mitigate the composition, where part of the occupation lies in another parish. 376
- 58 The manner in which the surveyors shall give notice of the time and place for compounding, and how such compositions shall be paid. 377
- 59 Where a draught or plough is kept and no carriage, one shilling shall be paid for every horse or pair of oxen. *ibid.* f. 14
- 60 The inhabitants may appoint three months in the year in which no statute duty shall be performed. *ibid.*
- 61 The livings of the clergy are within this statute. f. 15
- 62 Lands suffered to *lie fresh*, neither occupied or let, are liable to perform the duty. f. 17
- 63 The performance of the statute duty is no answer to an indictment for not repairing. f. 18
- 64 The manner in which the funds of *turnpike roads* may be applied to the statute duty of highways. f. 19
- 65 Persons serving in militia are exempted from statute duty. 377 (4)
- 66 ASSESSMENT OF RATES. 379 f. 20
- 67 The sessions may order a rate, not exceeding 6*d.* in the pound, to defray the expenses of procuring materials, &c. for the repairs. 379
- 68 But such an order is bad unless it shew that the statute duty was not sufficient; and if it charge the occupiers of lands only; for others are also liable. *Page 379* (N) 9
- 69 But if the funds are exhausted, or are insufficient for the maintenance of the highways, the sessions may cause an equal assessment for that purpose, provided the said rate of 6*d.* and this assessment do not in any one year exceed nine pence in the pound. 380 f. 22
- 70 All forfeitures shall be paid into the hands of such persons as the court inflicting them shall direct for the benefit of the highways on penalty, for the misapplication of double the sum received. 381
- 71 If any forfeiture is levied upon a particular inhabitant for the default of, or on account of the parish, the sessions may cause a rate to be levied within one month by the surveyor for reimbursing him. *ibid.*
- 72 The court also will grant a *mandamus* for a rate to reimburse a particular district, for a fine paid on the conviction of another district in the same parish, both bound to repair; but such *mandamus* must be special. (N) 10 *ibid.*
- 73 Feoffees or trustees of lands granted for the repair of highways shall let them to the best advantage; and the sessions may enquire into the management thereof. 382
- 74 No shelter for robbers to conceal themselves to remain near the highways. f. 26
- 75 Every public cartway shall be twenty feet wide; and every horse way eight wide. f. 27
- 76 Two justices, upon view, may order highways to be widened or diverted; so as not to exceed thirty feet in breadth; and so as not to pull down any building, or encroach on any garden, court or yard. 383
- 77 The surveyor shall make satisfaction to the owners for the ground which shall be necessary for the widening or diverting such highway. *ibid.* f. 28

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- 78 If they refuse to treat, or cannot be found, or will not accept the satisfaction offered by the surveyor; the session upon certificate shall impanel a jury who shall assess the value, not exceeding forty years purchase; and upon tender thereof, or leaving the same with the clerk of the peace, the ground shall be forever divested and become a public highway. *Page 384*
- 79 But all subterraneous property of value which can be acquired without injuring the surface of the highway is saved to the owners of the land. *ibid.*
- 80 And all timber and wood thereon shall be felled within a month and laid upon the adjoining land for the benefit of the owner. *ibid.*
- 81 And where the funds in the hands of the surveyor are not sufficient for these purposes the sessions may order a rate not exceeding 6d. in the pound yearly accordingly. *ibid.*
- 82 The old highway to be sold, in which a preference is to be given to the occupiers of the adjoining lands. *385*
- 83 And if it lead to any land, house, or place, the sale shall be subject to such right of passage. *ibid.*
- 84 And upon tender or payment of the money (as described) the land shall vest in the purchaser, saving the right of all subterranean property to those who would otherwise have been intitled. *ibid. f. 29*
- 85 If the jury shall assess a greater sum than what the surveyor offered, the costs shall be paid from the surveyor's fund; if a less sum, they shall be paid by the owners of the land. *f. 30*
- 86 Two justices may divert any highway, not in the situation before described, if the owners of the land through which the new road is to pass will consent, and may purchase, stop up, and sell, as in roads to be widened or diverted. *386 f. 31*
- 87 Persons aggrieved by any such proceeding, or by any *ad quod damnum* for this purpose, may appeal to the next sessions, &c. *387*
- 88 No old way shall be stopped up before the new way is completed. *Page 387*
- 89 New highways which have been peaceably acquiesced in for 12 months shall become incontrovertible. *ibid.*
- 90 No common land lying between the fences of any old highway shall be inclosed. *388*
- 91 Land, between the fences not being common, exceeding 30 and not extending to 50 feet in breadth, shall not be stopped till satisfaction is made to the owners for all the land exceeding 30 feet. *388 f. 32*
- 92 And if the old road shall have passed through common land, or if the space between the fences, the land not being common, shall exceed 50 feet in breadth, the respective owners of such land shall hold and enjoy the old highway, making satisfaction for the same. *ibid.*
- 93 Where a footway is diverted through a different part of the same lands, no satisfaction shall be made except the new road shall be longer, or that part of the land of greater value. *f. 33*
- 94 If the footway shall not go through the same person's lands, satisfaction shall be made to the owner of the new land by the award of two persons and an umpire. *ibid.*
- 95 Two justices upon view may stop up and sell, or may divert all highways which are useless and burthensome to the parish. *389 f. 34*
- 96 OF THE SURVEYOR. *389 c. 35*
- 97 The officers and parishioners shall assemble yearly on the 22d. September at 11 o'clock in the forenoon. *ib.*
- 98 But the presence of the officers is not essential to the legality of the meeting. *(N)*
- 99 The majority shall make a list of ten parishioners each possessing a real estate of 10*l.* a year or who rent 30*l.* a year, or worth 100*l.* personally. *ib.*
- 100 If a sufficient number of qualified parishioners cannot be found, the deficiency shall be supplied by the most able inhabitants. *390*
- 101 Within three days after, the constable shall transmit a copy of the list to the justice of the division, and shall

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- shall send the original list to the special sessions, after Michaelmas session and give personal notice to the ten persons named to appear at such special session to accept (if appointed) of the office of surveyor, or *show cause to the contrary*. Page 390
- 102 The justices at such special sessions shall appoint one, two or more surveyors from the said list, preferring such as are qualified, which shall be notified to the persons chosen who shall be surveyors for the ensuing year. 391
- 103 But if the list has been riotously procured, the justices may reject it. (N) 15
- 104 If any named in the list refuse to serve, they shall forfeit 5 *l.* *ibid.*
- 105 And upon default the justices may appoint inhabitants of the county living within three miles of the parish, and if they refuse, they shall forfeit 50 *l.* *ibid.*
- 106 A surveyor who has served one year shall not be appointed for three years afterwards. *ibid.*
- 107 If no list is returned, or if default shall be made by such as they appoint, two justices at special session may in their discretions appoint a surveyor, with a salary to be paid from the forfeiture, but not to exceed one-eighth of the 6 *d.* rate. *ibid.*
- 108 The justices may order the collector to return an account of the said assessment. 392
- 109 Officers neglecting their duty in the premises shall forfeit 40 *s.* *ibid.*
- 110 Where a surveyor with a salary is appointed, the justices shall also appoint an assistant, who shall forfeit 40 *s.* if he refuses to serve; and another shall be appointed liable to 50 *s.* for refusing; and they may then appoint one with a salary. *ibid.*
- 111 An assistant who has served one year shall not be again appointed for three years without he consents *hereto*. 392
- 112 The surveyor shall give bond if required. *ibid.*
- 113 Two parts in three of the parishioners assembled as aforesaid may recommend a surveyor with a salary to the justices. Page 392
- 114 If the surveyor dies or becomes incapable during the interval of the sessions, two justices may appoint a person to officiate untill the session. *ibid.*
- 115 More surveyors than one to be comprehended under the word surveyor. 394
- 116 The salaries of surveyors in cities, &c. must be approved by two thirds of the parishioners. *ibid.*
- 117 DUTY OF SURVEYOR. 394 *l.* 37
- 118 The assistant shall obey the surveyor; and account to him for the monies he receives on pain of doubling the value, and for any neglect he shall forfeit not more than 5 *l.* nor less than 40 *s.* *ibid.*
- 119 The surveyor shall draw upon the assistant for all sums amounting to 40 *s.* but he shall not be answerable unless his drafts are paid. *ibid.*
- 120 Surveyors shall view the highways and give notice to remove obstructions; and if not done within 20 days, the surveyor may do it at the cost of the party who shall forfeit one penny for every foot. 396
- 121 The surveyor shall, upon oath, inform two justices of highways, bridges, causeways, &c. out of repair, which any particular persons are bound to repair. *ibid.*
- 122 And if they are not repaired, upon notice to the owners, they shall be presented at the sessions. *ibid.*
- 123 Justices may order which of the highways shall be first repaired. *ibid.*
- 124 How, where, and in what manner the surveyor shall erect direction posts, &c. 397
- 125 Where and in what manner the surveyor may get materials for the repairs. *ibid.* *l.* 40
- 126 How materials shall be obtained where there are not sufficient within the parish. 398 *l.* 41
- 127 The surveyor shall fence off all pits and holes made in digging materials. 399 *l.* 42
- 128 How materials dug for the use of a different parish than that in which they lie shall be removed. 400
- 129 The

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- 129 The penalty for damaging mills, &c. *Page 400 f. 43*
- 130 In what manner the surveyor shall keep his accounts. *401 f. 44*
- 131 The surveyor may contract for materials. *402 f. 45*
- 132 Surveyors neglecting their duty shall forfeit between 10 and 5 *l.* *402 f. 46*
- 133 Justices of cities, &c. may execute this act. *ibid.*
- 134 If the surveyor receives money due to the turnpike roads, he shall pay it to the treasurer. *f. 47*
- 135 Of NUISANCES to highways. *405*
- 136 The adjoining lands are bound to scour the ditches and to lop the trees. *f. 52*
- 137 The surveyor shall give ten days notice to the landholders next adjoining the road to cut and prune their hedges, and upon default the justices may order the same to be done and if such order is not complied with in ten days, the surveyor shall cut and prune at the expence of the owner of the land who shall pay over and above 2 *s.* for every 24 feet of hedge and 2 *s.* for every tree. *406*
- 138 The landholder shall make proper ditches, drains, and keep them properly scoured and in repair on pain of 10 *s.* *f. 55*
- 139 And where the old ditches, &c. are not sufficient the surveyor shall order new ones to be made. *407*
- 135 No small tree or bush, whereby a man may lurk, shall stand within 200 feet of either side of a highway. *407 f. 58*
- 136 No tree, bush, or shrub, shall grow within 15 feet from the center of any highway, unless for ornament, &c. *f. 59*
- 137 The season in which hedges shall be pruned, and trees felled. *f. 60*
- 138 Whoever shall lay any thing in a highway, for five days, so as to obstruct or injure the same, shall forfeit 10 *s.* *408 f. 62*
- 139 And if not removed within five days after notice, by the surveyor, it shall be sold. *f. 62*
- 140 Obstructions by carriages, unless for a reasonable time to unload, forfeit 10 *s.* *Page 409*
- 141 Penalty for incroaching upon highways. *f. 63*
- 142 No alehouses suffered on bridges. *ibid.*
- 143 Penalty for damaging banks, causeways, &c. &c. *64*
- 144 HORSES AND CARRIAGES ON HIGHWAYS. *410 f. 65*
- 145 Justices, at sessions, may license an additional member, and stop proceedings for the forfeiture. *411*
- 146 The owner's name, &c. to be painted on all carriages. *412*
- 147 The penalty for the negligent or impertinent behaviour of drivers. *ibid. f. 66*
- 148 The forms to be observed in proceedings. *413 f. 67*
- 149 Abstracts of 13 Geo. 3. c. 78. to be given to the surveyor. *f. 68*
- 150 Forfeitures, &c. to be levied by distress, &c. *f. 69*
- 151 How convictions shall be made. *f. 70*
- 152 OF PRESENTING HIGHWAYS. *414 f. 71*
- 153 Justices of assize upon view; and justices of peace upon view, or information, on oath, by the surveyor, may present at the assizes, great sessions of Wales, or quarter sessions, any highway, causeway, or bridge, out of repair, within the jurisdiction and county where they lie. (*Vide* No. 176.) *415 & 418 f. 78 & 79*
- 154 No such presentment, nor any indictment shall be removed by *certiorari*, until traverse and judgment. *ibid.*
- 155 But on the part of the *prosecution* it may be removed before traverse and judgment; for the restriction was to prevent delay by *defendants*. *ibid.*
- (N) 21
- 156 But if the right to repair is in question, the defendant may remove the proceedings. *415*
- 157 And every such *presentment* shall have equal force as if it had been found by a jury. *ibid.*
- 158 Saving the right of traverse, as to the fact of non-repair, as well as to the right of repairing. *f. 72*

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- 159 The justices are compellable by *mandamus* to receive a general traverse. *Page 415 (N) 23*
- 160 The justices may order the prosecution to be at the expence of the limit, and on conviction may fine the offender. *ibid.*
- 161 The right to traverse confirmed. *f. 72*
- 162 ASSESSMENTS may be levied by distress, and the surveyor to be a competent witness. *f. 73*
- 163 How the prosecutor may proceed for a forfeiture *about forty shillings*. *f. 74*
- 164 Ten days notice before action commenced and none to be brought after a month has expired. *417 f. 75*
- 165 No distress unlawful, or the party a trespasser for want of form. *f. 76*
- 166 The court may award costs to either party according to the circumstances. *f. 77*
- 167 A defendant indicted for not repairing *ratione tenuræ*, shall, on submission, pay costs. *ibid. (N) 24*
- 168 The parishioners may agree to bear the charges of any prosecution or defence. *f. 77*
- 169 But public notice shall be given of every meeting of the parish. *ibid.*
- 170 Forfeiture for opposing the execution of the act. *418*
- 171 If the quarter sessions exceed their authority; as to order a surveyor to make out his accounts before a special sessions, such proceedings may be removed by *certiorari*, and quashed; for their power, in such case, is not original but appellate. *f. 80*
- 172 Justices are empowered to administer oaths, in respect to highways. *419*
- 173 On giving fit notice they may hold a special sessions. *ibid.*
- 174 OF DEFENDANTS, &c. *ibid. f. 82*
- 175 Persons aggrieved may appeal to the quarter sessions, giving notice thereof, within six days after the cause arose, and entering into a recognizance with one surety, within four days after the notice. *ibid.*
- 176 On notice of such appeal, all proceedings to be returned to the sessions, on pain of 5*l.* *ibid.*
- 177 The sessions shall hear the appeal in a summary way, and decide *finally*; and award costs as the decision shall be. *Page 419*
- 178 Limitation of actions, &c. *420*
- 179 No one shall be convicted without being summoned. *f. 83*
- 180 An indictment for not repairing an highway ought to shew the place from which and to which it leads. *f. 86*
- 181 But an objection for want of this has been disallowed. *Note marg.*
- 182 If for a nuisance it must expressly shew the place where it was done. *f. 87*
- 183 So for want of repair the highway must be shewn to lie in the parish bound to repair. *ibid.*
- 184 How an indictment for not repairing *ratione tenuræ*, must alledge the offence. *422 f. 90*
- 185 The defendants ought not to plead *quod non debent reparare* without shewing who ought. *423 f. 93*
- 186 Defendant shall not be discharged on paying the fine, but a *disfringas* shall go till they repair. *f. 94*
- HIGHWAYMEN.—*Vide Robbery. Attempt to rob.*
- H O G S.—*Vide Nuisance.*
- HOLIDAY.—*Vide Church.*
- HOLLIES.—*Vide Trees. Freehold.*
- HOMICIDE.—*Vide Felo de se. Murder. Manslaughter.*
- 1 Homicide is an offence either against a man's own life or that of another. *102 c. 27*
- 2 Homicide against the life of another, is either justifiable, excusable, or felonious. *104 c. 28*
- 3 Justifiable homicide causes no forfeiture at all. *ibid.*
- 4 Excusable homicide causes forfeiture of goods. *ibid.*
- 5 Felonious homicide is murder or manslaughter. *ibid.*
- 6 JUSTI-

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- 6 JUSTIFIABLE HOMICIDE must be owing to some unavoidable necessity, and the party killing must be free from all manner of fault. *Page* 105
- 7 There must be no malice covered under the pretence of necessity. *ibid.* f. 2
- 8 If a special justification can be pleaded in homicide; and the plea is found for the defendant, he shall be dismissed and neither put to plead not guilty, or to purchase his pardon. *ib.* f. 3
- 9 Justifiable homicide is either in the due execution or advancement of public justice, or in the just defence of a man's person, house, or goods. *ibid.*
- 10 The judgment by which a person is executed must be given by one who has jurisdiction, or it will not justify either the judge or the officer. f. 4
- 11 If common pleas give judgment of death, or justices of peace award execution in treason, and it is done, both judges and officers are guilty of felony. f. 5
- 12 But if justices of peace, on indictment of trespass, arraign for felony, and the prisoner is executed, the justices only, and not the officers are guilty. 106 f. 6
- 13 The judgment must be executed by the lawful officer. 106 f. 7
- 14 If the judge who sentences, or any private person, or even the officer without lawful warrant, executes an attainted person, they are, (contrary to former opinions) guilty of felony. f. 8, 9
- 15 The execution must be pursuant of and warranted by the judgment. f. 10
- 16 But the king's warrant may remit the ignominious part of the punishment and the officer is justified in doing execution accordingly. (N) 1
- 17 Any person may justify killing another who has been guilty of felony and cannot otherwise be taken. f. 11
- 18 So an officer may justify the killing an innocent person, indicted of felony, if he cannot otherwise be taken. f. 12
- 19 If a criminal, endeavouring to break gaol, assault his gaoler, he may be lawfully killed by him. 107 f. 13
- 20 Rioters, &c. resisting the endeavour of a justice to arrest them, the killing them may be justified. *Page* 107 f. 14
- 21 So also may a private person, in defence of himself against them. *ibid.*
- 22 And so perhaps if he cannot otherwise suppress them. *ibid.*
- 23 A stranger, assaulted by combatants whom he endeavoured to part, who kills one of them may justify it if they knew his interposition was for that purpose. (N)
- 24 Trespassers in deer parks, &c. not surrendering to the keeper, may be justly slain by him by force of the statute 21 Edw. 1. c. 2, 3, & 4 W. & M. c. 10. f. 15
- 25 In trial by battle, if one combatant kill the other he is justified. f. 16
- 26 But in all these cases the killing is not justifiable unless it was unavoidable. (N)
- 27 If a sheriff, endeavouring to retake upon an escape in civil process and kills the person in the affray it is justifiable. f. 17
- 28 The officer in such a case is not bound to give back. f. 18
- 29 But no private person can justify homicide in arresting a man on civil process, as he may in felony. f. 19
- 30 Nor can the sheriff lawfully kill those who basely fly. 108 f. 20
- 31 Killing a wrong-doer in defence of a man's person, house, or goods may be justified. f. 21
- 32 As where a man kills one on the highway who assaults to rob or murder him. *ibid.*
- 33 Or if the owner or any of his inmates kills one who attempts a felony on it. *ibid.*
- 34 A woman may justify killing the man who attempts to ravish her. *ibid.*
- 35 A servant, who finding his master slain, and apprehends the like event to himself, may justify killing the murderer. *ibid.*
- 36 A parent or a husband may justify killing the forcible ravisher of a wife or daughter's virtue. *ibid.* (N)
- 37 But the person justifying must be wholly free from fault. f. 22
- 38 A man

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- 38 A man cannot justify killing another in defence of his house or goods, or even of his person, from a *bare private trespass*. *Page* 108 f. 23
- 39 The question argued whether it is not justifiable to kill when the trespass is violent and indicates an intention to murder. 109 f. 24
- 40 A distinction taken between an assault on the highway and in a town. f. 25
- 41 By 24 Hen. 8. c. 5. those who are indicted for *the death* of persons attempting to murder, rob or burglariously to break into mansion houses shall incur no forfeiture and be discharged. 110
- 42 Not only the master of a house but a lodger or sojourner who kills an assailant is within the protection of the statute. *ibid.* (N)
- 43 This reaches not any crime unaccompanied with force, nor to the breaking open any house in the day time unless it imports an intention to commit robbery or arson. *ibid.*
- 44 A man is not justified in killing another whom he taketh in adultery with his wife. *ibid.*
- 45 In what case the killing an *innocent person* for the preservation of a man's own life is said to be justifiable. f. 26, 27
- 46 Excusable homicide is either *per infortunium* or *se defendendo*—*See* *vide ante* EXCUSABLE HOMICIDE.

HONEY AND WAX.

- 1 By 23 Eliz. c. 8. to mingle any resin, tallow, turpentine or other deceitful thing in the melting of wax incurs a penalty of 2 s. a lb. 522 f. 122
- 2 If any melter shall neglect to stamp his name on the outside of every piece of melted wax he shall forfeit every piece so unstamped. 523 f. 123
- 3 Every seller also who shall stamp his name thereon that it may be known who were the workers thereof. f. 124
- 4 Every package of honey shall be marked with the name of the filler

- on pain of 6 s. 8 d. a package. *Page* f. 125
- 5 Whoever shall fill honey less than 32 wine gallons the barrel—16 the kilderkin—8 the firkin, shall forfeit 5 s. for every half gallon deficient. f. 126
- 6 But these penalties shall not extend to persons selling wax, &c. from their own bees, nor to servants, &c. f. 127
- 7 Whoever shall counterfeit the marks aforesaid shall forfeit 5 l. f. 128

H O P S.

- 1 Hops were not within the statutes against forestalling. 488

H O P B I N D S.

- 1 By 6 Geo. 2. c. 37. maliciously to cut any hop binds growing on poles in any plantation of hops is felony without clergy. 238 f. 2

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- 1 How hostlers and innkeepers shall be punished for making or selling horse bread of an insufficient weight or quality. 454

HORSE CAUSEWAYS.—*Vide* *Highways*.

H O R S E C O U R S E R.

- 1 No horse courser shall travel, or come to his inn on the lord's day on pain of 20 s. 11, 12

HORSES.—*Vide* *Purveyors*. *Highways*.

- 1 The taking of horses, &c. may be felony. 144 f. 28
- 2 If in a field and the felonious taker be apprehended before he gets out, it is a sufficient asportation. 141

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- 1 All householders dwelling in any county or town whether they occupy lands or not are within the statute of bridges. Page 449

HOUSE.

- 1 In what cases larceny from the house is debarred of clergy. 151 c. 36
- 2 To break and enter feloniously the mansion house of another in the night is burglary. 159
- 3 What is such a house in which burglary may be committed. 162, 165
- 4 The anxiety with which the law protects a dwelling house. 165 (N)
- 5 The species of house in which arson may be committed. 166
- 6 What part of the house must be burnt to complete the crime. *ibid.*
- 7 The punishment of servants in negligently setting fire to a house. 197
- 8 How far it is lawful for a man to assemble his friends in the defence of his house. 267 f. 8. 297 f. 10
- 9 How far a constable may enter a house to suppress an affray therein. 269 f. 16
- 10 It is felony riotously to pull down, or begin to pull down a house. 308, 309
- 11 In what cases a man may justify homicide in defence of his house. 109, 110

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- 1 Hunger is no excuse for theft. 141
- 2 A tenderness to be exercised upon this occasion. *ibid.* (N) 6

HUSBAND.—*Vide Feme Covert.*

- 1 A wife may demand surety of the peace against her husband threatening to beat her outrageously. 253 f. 4

- 2 A husband may have it also against his wife. Page 253 f. 4
- 3 Cases in which it has been granted to peers and peeresses. 255 (N) 4
- 4 A husband and wife considered as one person in law. 141 f. 19
- 5 The husband of an heiress apparent may lawfully maintain the ancestor in an action concerning the inheritance of the land whereof he is seized in fee. 538 f. 15
- 6 The husband alone may bring a *detinuerunt* for embracery in an action by husband and wife. 552 f. 19
- 7 What property a husband is seized of in right of his wife, he shall forfeit as *feilo de fe.* 103 f. 7
- 8 A husband may justify the killing the forcible ravisher of his wife's virtue. 108 (N)
- 9 But not if he take them in *hore* adultery. 110 (N) 1
- 10 If a wife procure a servant to kill her husband they are both guilty of petty treason. 133
- 11 If a stranger procure a wife to kill her husband he may be indicted as accessory to the treason. *ibid.*
- 12 A wife cannot be found guilty with her husband in the statute 3 & 4. W. & M. c. 9. against robbing lodgings. 137 (N) 3
- 13 If the lodgings were let to the husband she cannot be found guilty at all. *ibid.*
- 14 And if let jointly, the taking shall be construed to be by the husband. *ibid.*
- 15 A husband is not liable to pay the forfeiture on an indictment against the wife for absence from church. 27 f. 39

HUNTERS.

- 1 Riotously assembled with painted visors, &c. may be obliged to surrender upon pain of felony. 186 c. 49
- 2 By 9 Geo. 1. c. 22. to appear disguised, or to kill fallow deer—to rob a warren—a coney burrow, or to steal fish from a pond *being armed and disguised*, &c. &c. Or to kill deer in any inclosed place, or to rescue another in custody for

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- for these offences is felony without clergy. *Page 187*
- 3 Offenders may be forced to surrender or be adjudged guilty of felony. *ibid.* f. 3
- 4 Those who prevent such surrender equally guilty. 188
- 5 By 5 Geo. 1. c. 28. whoever shall enter any park where deer are kept, without licence, shall be transported. 189 f. 6
- 6 By 16 Geo. 3. c. 30. to kill, destroy, or snare any fallow deer forfeits 30 l. if by a keeper double; and the second offence is transportation. *ibid.* f. 7
- 7 Justices may search the houses of suspected offenders. 190
- 8 The punishment of laying snares for deer. *ibid.* f. 9
- 9 To enter an inclosed park armed, &c. transportation. 191
- 10 Dogs and engines may be seized by keepers. *ibid.* f. 10

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- 1 In what case the court of hustings may be appealed to from the sheriffs court. 16 (N) 2

I. J.

J A C T I T A T I O N.

- 1 **A** Sentence of *jaqitation* in the ecclesiastical court, is not conclusive evidence against a former marriage, on an indictment for polygamy, on the 21 Jac. 1. c. 11. 175 (N)
- 2 And, admitting it to be conclusive, yet the validity of it may be impeached, by evidence that it was obtained by fraud and collusion. *ibid.*

I D E N T I T Y.

- 1 When the fact of identity is a collateral issue, it may be pleaded and replied to *oro tenus*; and may be tried

by the principal jury, or on a *voirie*, returnable *instantly*. *Page 3 (N) 5*

I D E O T.

- 1 An idiot is one whose understanding is defective from his birth. 2 (N) 2
- 2 A person born deaf and dumb is, *prima facie*, an idiot. *ibid.*
- 3 Idiots are not punishable by any criminal prosecution whatsoever. 1, 2
- 4 If an idiot commit a trespass against the person or possession of another, he may be compelled to make satisfaction in damages. 3 f. 5

J E S U I T.—*Vide Papists.*

- 1 By 27 Eliz. c. 2. whoever shall receive, relieve, or comfort, &c. any jesuit, &c. shall be deemed a felon without clergy. 76 f. 21

J E W S.

- 1 It hath been questioned whether Jews, &c. have a right to demand surety of the peace. 53 f. 3

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- 1 The king may remit the ignominious part of a judgment.

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I M A G I N I N G.—*Vide Treason.*

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I M P L I C A T I O N.—*Vide Felony Statute.*

I M P L I E D M A L I C E.—*Vide Murder. Manslaughter.*

- 1 Is when homicide happens in the execution of an unlawful action, principally intended for some other purpose.

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pose, and not to do a personal injury to him in particular who is slain. *Page* 122

IMPORTATION.

- 1 Aliens may import their fish or other victual, without molestation. 480 f. 7
- 2 Merchandize imported, may be sold in gross. 479 f. 3
- 3 Such importations not within the statute of ingrossing, &c. *ibid.*
- 4 The crown may stop the importation of cattle, to prevent the introduction of disease. 180

IMPOSTORS.

- 1 Impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying the people with false denunciations, are punishable by the *temporal judges* with fine and imprisonment, &c. 10

IMPRISONMENT.—*Vide Gaoler.*

INCAPACITY.—*Vide Officers. Discretion. Infants. Idiots, &c.*

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INCLOSURE.—*Vide Black Ab. Deer. Hunters. Fish.*

INCORRIGIBLE ROGUES.—*Vide Vagrants.*

INDICTMENT.—*Vide Contra pacem. Vi et armis.*

- 1 In an indictment for forcible entry, *soli die intravit, &c. et ipsum A. B.*

manu forti diffinivit, are sufficient without adding *ad tunc et ibidem*. *Page* 286 f. 42

- 2 But in murder it is a fatal mistake not expressly to shew the day and place of the stroke, as well as of the assault. 287
- 3 In an information or indictment on a penal statute, the words of the statute must be precisely pursued. 484 f. 20, 28. p. 342 f. 25
- 4 In what manner the words of the statute of treasons have been pursued in indictments 51 f. 6
- 5 How an indictment against a popish priest must be framed. 68 f. 82
- 6 In an indictment for not taking the oath, any misrecital of the very words of the oath is erroneous. 83 f. 36
- 7 In an indictment on 8 Eliz. c. 4. the prisoner shall have his clergy sales laid *clam et secreto*. 151
- 8 An indictment for forcible marriage ought to alledge that it was *for lurr.* 172 f. 4
- 9 An indictment on a statute need not shew that the defendant is within the benefit of an exception. 20, 21 484
- 10 An indictment is not vitiated by false Latin unless it be unintelligible or nonsensical. 342, 104
- 11 How forgery on the statute may be set forth. 343
- 12 What is necessary in an indictment for nuisance. 361, 422
- 13 It is justifiable to kill an innocent person, *indicted*, if he fly from process. 106 f. 12
- 14 A person may be indicted in one county for goods stolen in another. 136, 137
- 15 In what county forcible marriage may be indicted. 171, 172
- 16 Every indictment of larceny must have the word *cepit* as well as *asperavit*. 134

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1 An innkeeper may be indicted at
common law for the nuisance of har-
bouring thieves, or suffering disorders,
or taking exorbitant prices, or if he
open a new inn unnecessarily, &c.

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2 If he refuse to entertain a traveller,
&c. he is liable to an action by the
party grieved. *453*

3 The constable may compel the re-
ception of a guest. *ibid.*

4 How he may enlarge or build a new
inn, upon the site of an old one. *f. 3*

5 They must sell their victuals and
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6 In what manner they may make horte
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1 Burglary may be committed in a
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1 In what manner lunacy may be tried
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1 By 28 Geo. 2. c. 13. insolvent pri-
soners guilty of perjury, in delivering
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- 1 There can be no felony without an evil intention. *Page 99*
- 2 Originally the bare intention to commit a felony, was felonious. *ibid.*
- 3 In burglary there must be an intention to commit felony. 164 f. 18
- 4 How far the intention with which persons assemble, will be unlawful, in order to constitute a riot. 294 f. 3
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- 1 High treason to make, or to have a coining instrument in custody. 64

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- 1 Formerly the invocation of an evil spirit was felony. 8

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- 1 Ireland is not a foreign nation as to the bringing counterfeit money from it. 65 f. 67
- 2 How far a popish priest going to Ireland, but driven again on the English coast by a storm, is guilty of high treason. 68, 69
- 3 Forgery of a lease of lands in Ireland, is not within 5 Eliz. c. 14. 341 f. 20

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- 1 How to be understood in a libel. 353

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- 1 A churchwarden is justified in laying hands on any person guilty of irreverent behaviour during divine service. *Page 272*

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JUDGE.

- 1 Bribery in a judge formerly punished as high treason. 314 f. 6
- 2 It is now a very high misdemeanor. *ibid.*
- 3 The Earl of Middlesex fined for bribery. f. 7
- 4 Judges of all courts of record are freed from all prosecutions whatsoever, as judges, except in parliament. 350 f. 6
- 5 Judges are not within 8 Hen. 6. c. 12. against altering records. 177 f. 4

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- 1 How far it is *premature* to impeach a judgment given at common law. 79, 80
- 2 Whether the *villainous* judgment shall be inflicted for conspiracy. 351
- 3 No instance of it since the reign of Edw. 3. 352

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- 1 How far it is felony in the officer to execute a convict where the judge has no jurisdiction. 105, 106
- 2 It is no justification of confederacy to carry on a malicious prosecution, that the court had no jurisdiction of the cause. 348, 349
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- 4 The quarter sessions have jurisdiction in conspiracy. 355

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- 1 Whoever shall strike a juror, &c. in court, shall lose his hand, his goods, the profit of his lands, and suffer perpetual imprisonment. *Page* 88 f. 3
- 2 A juror who gives a verdict contrary to manifest evidence, is not thereby guilty of perjury. 322 f. 5
- 3 Jurors not liable to any prosecution whatsoever, in respect to their verdict, *in a criminal matter.* 349 f. 5
- 4 They were formerly questioned in the *Star Chamber.* *ibid.*
- 5 But *attaint* lies against jurors for a false verdict in a *civil cause.* *ibid.*
- 6 In questions of repairing bridges no inhabitant ought to be a juror. 444 f. 6
- 7 It is *maintenance* for a juror to *solicit* a judge for judgment, after he has given his verdict. 556 f. 8
- 8 A juror may exhort his companions to give such a verdict as he thinks right, 537

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- 1 Have no jurisdiction of forcible entry. 292 f. 61
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KILLING.—*Vide Murder.*

KING.—*Vide Treason. Contempt.*

- 1 EVERY offence tending to the prejudice of the king, is indictable. *Page* 361 f. 4
- 2 A prerogative given to one king goes to his successors. 83 f. 28
- 3 The reason is, that the king never dies 273 f. 31
- 4 A mistake to his prejudice may be assigned for, even where nothing else can. 25 f. 29
- 5 The king's title to land must always appear upon record. 28 f. 45

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- 1 THE king's title to it must always appear upon record. 28 f. 45
- 2 In recusancy, the king cannot seize lands, till inquisition found. *ibid.*

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L A R C E N Y.

- 1 Larceny is either simple or mixed; simple larceny is either grand or petty. *Page 134 c. 33*
- 2 Simple grand larceny is the taking and carrying away of goods, neither from the person nor the house, above the value of 12 d. *ibid. f. 1*
- 3 Every indictment of larceny must have the *felonice cepit* as well as *asperavit*. *ibid. f. 2*
- 4 As all felony includes trespass, if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. *ibid.*
- 5 One who finds goods and converts them to his own use *animo furandi* is no felon. *ibid. f. 3*
- 6 One who has the *actual possession* of goods by delivery, cannot be guilty of felony in embezzling them afterwards. *ibid.*
- 7 A reason given for this rule of law. *135*
- 8 But if those who have the *possession* of goods by delivery take away part thereof with intent to steal it, it is larceny. *ibid. f. 5*
- 9 For the possession of a part distinct from the whole was gained by wrong, and not delivered by the owner. *ibid.*
- 10 To constitute larceny the property must be taken from the possession of the owner. *ibid. (N) 1*
- 11 And if the felonious design be hatched subsequent to the delivery of the goods it is no felony. *ibid.*
- 12 But if the delivery of the goods be obtained with a *premeditated* design to steal them, the possession shall still be supposed to reside, unparted with, in the owner. *ibid.*
- 13 And where the delivery of goods to another, is only made for the special purposes of the person who delivers them, and is not made to the use of the person to whom they are delivered, the possession is construed to remain with the owner, and the taking of them away is felony. *ibid.*
- 14 Instances of convictions upon this rule. *ibid.*
- 15 It is felony to take away goods of which a person has the *bare charge, or the special use*, as a shepherd of sheep, &c. *Page 136 f. 6*
- 16 If a carrier, after he has brought goods to the place appointed, take them away again secretly, *animo furandi*, he is guilty of felony. *ibid. f. 7*
- 17 If goods be obtained under colour of the process of law, the taking of them feloniously away is larceny. *f. 8*
- 18 A person who steals goods from one who had stolen them before, may be indicted for stealing the goods of the real and true owner. *f. 9*
- 19 An indictment for larceny may be brought, either in the county where the goods were stolen, or in the county where they are found. *ibid.*
- 20 But if goods stolen at sea, be taken into any county, the thief cannot be indicted for felony there, because the original taking was not felony at common law. *137*
- 21 By 13 Geo. 3. c. 31. Persons stealing goods in either part of the united kingdom may be indicted in the other part of the united kingdom where they are found, &c. *ibid.*
- 22 It was felony by common law to steal furniture from lodgings, if the lodgings were taken, as a *dwelling*, to rifle them. *ibid. f. 10*
- 23 By 3 & 4 W. & M. c. 9. whoever shall take away with intent to steal, embezzle, or purloin any chattel, bedding or furniture let to them with their lodgings, shall suffer as in case of felony. *ibid.*
- 24 A wife cannot be found guilty with her husband upon this statute; nor without, if the lodgings were let to him; and a joint taking shall be construed his act only. *(N) 3*
- 25 The offender must be a lodger at the time the larceny is committed. *ibid.*
- 26 The indictment must set forth the name of the person by whom the lodgings were let. *ibid.*
- 27 The property stolen must be such as may reasonably be construed furniture of the lodgings taken. *ibid.*
- 28 By 21 Hen. 8. c. 7. "If any servant, above eighteen years of age, and

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- and not an apprentice, shall withdraw and go away from his master with any caskets, jewels, money, or goods delivered to him to keep, to the intent to steal the same—or being in his master's service, shall, without his assent, convert the same to his own use with a like intent, if above the value of 40*s.* he shall be guilty of felony." *Page 138 f. 4*
- 39 The offender must be servant, both at the time of the delivery of the goods, and at the time they are taken. *f. 12*
- 40 It is *strictly* confined to such goods as are delivered to keep. *f. 13*
- 41 A servant who receives goods from another servant, to keep for his master, is within the statute. *139*
- 42 No waiting of goods is with in the act, nor any obligation or other *chose in action*. *f. 14*
- 43 The things taken must be the property of the master *at the time*. *139 f. 15*
- 44 What things shall be considered as such property. *ibid.*
- 45 By 12 Ann. c. 7. the benefit of clergy is taken away from the offence of stealing the value of 40*s.* out of any dwelling or out-house, generally, excepting persons under the age of 15 years. *f. 16*
- 46 By 7 Jac. 1. c. 7. those who shall embezzle yarn, &c. &c. delivered them to work, shall be whipped, &c. on conviction by two justices. *f. 17*
- 47 By 17 Geo. 3. c. 56. the same punishment extended to servants in the hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, silk, and dying manufactures. *140*
- 48 By 15 Geo. 2. c. 13. if any servant of the bank, entrusted with the effects of the company, &c. shall secrete, embezzle, or run away with the same, he shall suffer death without clergy. *139, 140*
- 49 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. if any servant, &c. of the post office, shall secrete or destroy any letter intrusted to, or coming to, his care, containing any security for the payment of money, he shall suffer death without clergy. *Pa c 140*
- 50 How an indictment upon this act must charge the offender. (N) 4
- 51 What *carrying away* will satisfy the word *asportavit*. *140 f. 18*
- 52 The least removal is sufficient though not quite carried off. *140, 141*
- 53 As taking sheats from a bed into a hall; or a horse at grass, though not out of the field; or goods from the head to the tail of a waggon; or an ear-ring from a lady's ear, though it lodge in her hair, &c. *ibid. (N) 5*
- 54 But a bale lying horizontally, and set on its end, but not moved from *the spot*, is no asportation. *ibid.*
- 55 To pull off the wool from another's sheep, or to strip their skins, or to take plate from a trunk, and lay it on the floor, are sufficient asportations. *ibid.*
- 56 Larceny may be committed by a *feme covert*, in stealing the goods of a stranger. *f. 19*
- 57 But not if she take her husband's goods. *ibid.*
- 58 A man may be guilty of larceny by taking away a wife with her husband's goods on her. *ibid.*
- 59 Hunger and necessity is no excuse for larceny. *f. 20*
- 60 Larceny cannot be committed of property any way annexed to the freehold. *f. 21*
- 61 Therefore, only a trespass to steal corn or grass growing, apples on a tree, lead from a house or church, unless they were severed at one time and taken away *at another*. *ibid.*
- (*See vide Corn and Lead.*)
- 62 The reason of this distinction. *143*
- 63 By the common law a *chose in action* is not capable of being feloniously stolen. *f. 22*
- 64 By 2 Geo. 2. c. 25. stealing any of the *securities* therein named, is made such felony, as stealing goods of the like value would be. *ibid.*
- 65 By 5 Geo. 3. c. 25. to rob any mail, or to steal any letter or packet, is death without clergy. *142, 143*
- 66 Larceny cannot be committed of things of a bale nature, as dogs, cats, bears,

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- bears, foxes, &c. &c. But by 10 Geo. 3. c. 18. a punishment is inflicted on *dog-stealing*. Page 142, 143 f. 23
- 56 Larceny may be committed of a *reclaimed hawk*, both at common law and by 37 Ed. 3. c. 19. *ibid.*
- 57 The property of which larceny is committed, must belong *to another*. f. 24
- 58 To take treasure *trove*, wreck, waif, or stray, is not felony, unless first seized by the person intitled to them. (*Sed vide Shipwreck.*) 144
- 59 Fish at their natural liberty cannot be the subject of larceny at common law. (*Vide Fish.*) f. 25
- 60 Nor deer, hares, or conies, in a forest, chace, or warren; (*Vide Hunters—Black Act.*) nor old pigeons, being out of the house, &c. f. 26
- 61 But it is felony to steal creatures *feræ naturæ*, fit for food and reduced to tameness. *ibid.*
- 62 So, also, wild animals so inclosed that the owner may take them whenever he pleases. *ibid.*
- 63 It is felony to take swans marked, or pinioned, and unmarked, if in a private river or pond.—But *quare*, as to their eggs or young ones. *ibid.* 27
- 64 Horses, or any creatures *domitæ naturæ*, and fit for food, as ducks, &c. or their eggs or young ones may be the subjects of larceny. f. 28
- 65 Felony may be of goods, the owner of which is unknown, and the indictment shall be *cujusdam hominis ignoti*. f. 29
- 66 Stealing the goods of a chapel, church, or parish, may be laid *una capella—bona domus et ecclesia—bona parochianorum*. 145
- 67 In stealing a shroud from a *dead corpse*, the property must be laid in the owner of it when it was put on. *ibid.*
- 68 In what case a man may be guilty of larceny in taking goods, the absolute property of which is in himself. f. 30
- 69 The value must exceed 12*d.* or the stealing will be only petty larceny. f. 31
- 70 If two persons steal goods above the value of 12*d.* each of them will be guilty of grand larceny. Page 145 f. 32
- 71 The stealing to above the value of 12*d.* must be at the same time, not separate acts of stealing; for the law will not permit things stolen at different times to be added together, in order to constitute either grand larceny or a capital offence. f. 33 (N) 12
- 72 Cases in which larceny is excluded from clergy. 140
- 73 Petty larceny is stealing goods of, or under the value of 12*d.* f. 34
- 74 All petty larceny is felony, and requires the word *feloniè*, but it is only punished with forfeiture of goods, and whipping, &c. f. 36
- 75 If the indictment be for stealing to the value of 10*s.* and the jury find a general verdict *guilty*, but that the goods were worth but 10*d.* it is only petty larceny. f. 35
- 76 By 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. persons convicted of grand or petit larceny, intitled to clergy, and liable to be burned in the hand, &c. may be transported for seven years. f. 37
- 77 There are no accessaries in petty larceny. (N)

L A W.

- 1 In what instance the law of *Moses* agrees with the common law of England in the crime of murder. 121
- 2 How the common law differs with the law of *Moses*, in respect to certain larcenies. 135
- 3 The *Mosaic* law rather proves the lawfulness, than the unlawfulness, of usury. 528
- 4 If the court, in time of peace, put a man to death, by *martial law*, both the judges and officers are guilty of murder. 130 f. 59
- 5 Aliens *invading* the kingdom, shall be tried by martial law. 51 f. 6

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LAW BOOKS.

- 1 The king may grant the exclusive right to print law books—the reason of this privilege. *Page 471 f. 6 (N) 6*

LAWYER.—*Vide Counsellor. Barrister. Attorney.*

LAY MAN.

- 1 The punishment of a *layman* for making an affray in the church. 271
- 2 The punishment of a *layman* for depraving the common prayer. 13, 14

LAZARETS.—*Vide Quarantine.*

LEAD.—*Vide Freehold. Stolen Goods.*

L E E T.

- 1 All affrays are inquirable at the leet. 265 f. 1.
- 2 The reason why the leet has no jurisdiction over a *private* assault. *ibid.*
- 3 A nuisance in *any way* is punishable by indictment in the court leet. 366 f. 1
- 4 A presentment for not repairing an highway, in the court leet, is not traversable, unless it concern the freehold. 416
- 5 As being bound to such repairs in respect of the tenure of his lands, &c. 421

LETTERS.—*Vide Post-Office.*

- 1 By 5 Geo. 3. c. 25. & 7 Geo. 3. c. 50. servants of the post-office embezzling any letter, packet, or bag of letters intrusted to his care, containing any security for the payment of monies, are guilty of felony without clergy 140
- 2 And whosoever shall rob any mail of, or steal any letter, packet, or bag of

letters sent or conveyed, office, shall suffer death by.

- 3 By 9 Geo. 1. c. 22. who send any anonymous or *fictitious* letter demanding money, venison, or other valuable thing, shall suffer death without clergy. 226
- 4 By 27 Geo. 2. c. 15. to send any *such* letter threatening to kill or murder another, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money, &c. be demanded, shall suffer death without clergy. *ibid.*
- 5 Constructions upon this statute. (N) 6
- 6 By 30 Geo. 2. c. 24. to send any such letter threatening to accuse any person of any crime, punishable with death or transportation or pillory, or other infamous punishment, with a view to extort money, goods, &c. shall be pilloried, &c. or transported. *ibid.*
- 7 It is a very high offence to challenge another, by letter, to fight a duel, or to carry such a letter. 266
- 8 Sending a letter full of provoking language without publishing it, is highly punishable. 356

LETTERS PATENT.—*Vide Monopoly. Grant.*

LEVYING WAR.—*Vide Treason.*

L E W D N E S S.

- 1 All *open* lewdness, grossly scandalous, is indictable as tending to subvert religion and morality. 10 f. 4, 5

L I B E L.

- 1 A libel is a malicious defamation in printing or writing, or expressed by signs, or by pictures. 352 c. 73
- 2 It is severely punished because of its direct tendency to a breach of the peace. *ibid.* f. 3

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- 3 So also scandal written in a scoffing or ironical manner, is libellous. *Page 353 f. 4*
- 4 So also a defamatory writing, expressing only one or two letters of a name, but significant of a particular person, is a libel. *f. 5.*
- 5 A friend of the party libelled, must prove that he understood its meaning, &c. *ibid. f. 6*
- 6 It is no justification of a libel that the contents are true *f. 6*
- 7 The reasons for this maxim. *ibid.* (N) 1
- 8 A writing which defames private persons, is equally libellous as if the object of the defamation was a public character. *354 f. 7*
- 9 But libels against public characters are most heinous. *ibid.*
- 10 But no scandalous or impertinent matter contained in public or in legal proceedings will amount to a libel, even if the court has no jurisdiction. *f. 8*
- 11 Yet if it manifestly appear that the sole intention of the suit was for the purposes of defamation, it may be otherwise. *ibid.*
- 12 But no presentment of a grand jury shall ever be esteemed libellous. *355*
- 13 Nor can any writing be libellous unless it reflect upon some person. *ibid.*
- 14 But writing an obscene book may be punished by the temporal courts. *ibid.* (N) 2
- 15 Those who compose a libel may be punished as well as those who publish it, and so may those who procure it to be composed or published. *f. 10*
- 16 Ignorance of the contents is no justification for dispersing a libel. *ibid.*
- 17 And if a person either read or hear a libel, and afterwards maliciously read or repeat it, or lend it to another, he is guilty of publication. *ibid.*
- 18 Copying a libel is *prima facie* evidence of publication. *ibid.*
- 19 If servants publish a libel during their master's imprisonment, they having no possible access to him, the crime shall not be imputed to the master, unless some privity appear. *ibid.* (N) 3
- 20 The *amantenfis* of a libel is guilty of making it. *Page 356*
- 21 Sending a provoking letter to another, is highly punishable. *f. 11*
- 22 Sending a libel to the party defamed is a publication. *ibid.*
- 23 So a defamatory petition, if delivered to any but a member of parliament, is a publication. *f. 12 & 15*
- 24 But barely to read a libel without a previous knowledge that it was a libel; or hearing it to laugh at it as a libel; or only to have a libel in one's custody, is not punishable. *f. 13*
- 25 But the custody of a copy of a libel, publicly known, is evidence of publication. *ibid.*
- 26 And, *quare*, if he who only repeats a libel in jest and merriment, is thereby guilty. *ibid. 14*
- 27 A libel is punishable by fine and corporal punishment in the discretion of the court. *357*

L I C E N C E.

- 1 How far necessary to enable recusants to go above five miles from home. *35. 40*
- 2 In what cases a dove-cote cannot be built by a tenant without licence from the lord *362*
- 3 The penalty of going abroad without licence. *74. 135*
- 4 By 26 Geo. 2. c. 33. it is felony without clergy to forge a marriage-licence. *173*
- 5 The manner in which retailers of ale, beer, spirituous liquors, strong waters, and made wines shall be licensed (*vide public-houses*). *454 to 464*

L I E.

- 1 He who gives the *lie* to another in Westminster-Hall, sitting the courts, shall be bound to his good behaviour. *89 f. 9*
- 2 Obtaining money, &c. by so artful contrivance, but merely on a bare naked lie is not punishable criminally. *344*

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1 In what cases it is felony to cut off another's lip. Page 175, 176

• **LITERARY PROPERTY.**—*Vide Books. Authors.*

L I V E R Y.

1 To give liveries for maintenance is highly criminal. 544 f. 43

L O C K S.

1 It is felony, without clergy, to destroy locks, &c. on navigable rivers. 198 c. 55

LODGER and LODGINGS.—*Vide Larceny. Burglary.*

1 It was doubtful at common law, whether robbing lodgings, *fairly taken*, of the furniture let with them, was felony. 137

2 If the lodgings were taken with an *original design* to steal the furniture, the taking was felonious. *ibid.*

3 By 3 & 4 Will. & Mar. c. 9. if any person shall take away with intent to steal any chattel or furniture, which by contract shall be let to him with lodgings, he shall suffer as in felony. *ibid.*

4 A wife cannot be found guilty with her husband on this statute. Page 137 (N)3

5 Nor without him, if the lodgings were let to him. *ibid.*

6 If the lodgings were let jointly, it shall be considered as the taking of the husband only. *ibid.*

7 The offender must be a lodger at the time of the felony. *ibid.*

8 The indictment must state the name of the person by whom the lodgings were let. *ibid.*

9 The property stolen must be the furniture of the lodgings, or such other thing, and may reasonably be construed to have been let with them. *ibid.*

10 The apartment of a lodger is his *mansion house*, and may be so laid in burglary, provided the landlord does not sleep under the same roof. 164

11 If the landlord sleep under the same roof, and the lodger's apartment is divided from the rest of the house and has a separate door, it may be laid as the mansion house of the lodger. 164

L O N D O N.

1 The charters of the city which require that the lord mayor shall be the principal in every judicial commission, extend not to such causes as are limited by statute to particular judges. 178 f. 8.

L O R D.

1 How far the lord may maintain the suit of his tenant. c. 83 f. 21

2 The licence of the lord where necessary to enable his tenant to build a dove-cote. 362

L O R D's D A Y.

1 No persons to assemble out of their own parishes for any sport whatsoever, nor any unlawful pastimes to be used by persons in their own parishes on Sunday, on pain of 3s. 4d. 11 f. 1

2 No market to be held on any festival.

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the four Sundays in harvest excepted.

Page 11 f. 2

- 3 No person shall publicly cry or sell goods, except milk before nine in the morning, and mackrel out of church-time. *f. 2 12 f. 4*
- 4 No common carrier, drover, &c. shall travel on this day, on pain of 20 s. nor any boat or barge, unless allowed by a justice, on pain of 5 s.—nor any game be destroyed—nor any house opened for publicly debating. *11 & 12 f. 4*
- 5 But works of necessity or charity may be performed—meat may be dressed and sold by victuallers—dinners may be baked by bakers, but *quarre*, as to rolls. *11 f. 2 (N) 2*
- 6 Fish carriages may travel on the Lord's day, and forty watermen may ply upon the Thames, hackney coaches may work within the bills of mortality. *12*

L O O M S.

- 1 Destroying them, in certain branches, of manufactures, made felony without clergy. *230 f. 2. 231 f. 3, 4 & 5*

LOTTERY ORDERS.

- 1 By 25 Geo. 3. c. 57. the counterfeiting of lottery orders or tickets made felony without clergy. *209*
- 2 The managers may act as magistrates in apprehending offenders. *ibid.*
- 3 A reward of 50 l. for discovering, &c. of offenders, and a pardon to accomplices. *ibid.*

L O V E.

- 1 Such as took upon them to do any thing tending to provoke unlawful love were punishable by the 1 Jac. 1. c. 12. for witchcraft—but that act is repealed by 9 Geo. 2. c. 5. and pretenders to such arts are punishable by 1 year's imprisonment, and standing four times in the pillory, &c. *9*

LUNATICS.—*Vide Madmen.*

- 1 Not punishable criminally. *Page 2*
- 2 Lunacy only, a partial derangement of mind. *2 (N) 2*
- 3 Vagrant and dangerous lunatics may be secured by the justices of the place where they are found. *2 f. 4*

LUNAR MONTH.—*Vide Computation.*

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M A C K R E L.

- 1 MAY be sold on Sunday. *12*

M A D M A N.

- 1 Madness is a total alienation of the mind. *2 (N) 2*
- 2 Anciently madmen were punished for treasons against the life of Majesty. *2 f. 2*
- 3 At present, madmen are not punishable by any criminal prosecution whatsoever. *2 f. 1*
- 4 If a prisoner become mad at any interval between commitment, arraignment, trial, conviction, judgment, or execution, all subsequent proceedings against him shall stop. *2 f. 3*
- 5 But the madness must be plain and unequivocal, not any idle frantic humour. *2 (N) 2*
- 6 How the fact of madness shall be tried. *3 (N) 5*
- 7 By 17 Geo. 2. c. 5. vagrant madmen, whose disorder is dangerous, may be secured and confined by an order of justices. *2 f. 4*
- 8 A madman may be compelled to make satisfaction by a civil action. *3 f. 5*
- 9 Madness induced by intoxication is no excuse for the commission of crimes. *ibid. f. 6*
- 10 Whoever incites a madman to commit a crime, is a principal offender. *ibid. f. 7*

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- 11 It is no forfeiture of a recognizance for the peace, to confine a friend who is mad. *Page 259 f. 23*
 12 The conclusion that self-murderers must be madmen, is ill founded. 102 f. 3

M A G I C.—*Vide Witchcraft.*

M A I L.—*Vide Post Office. Larceny.*

M A I M.

- 1 Maim is an injury to the person of another, by which he is rendered less able to defend himself, or annoy his adversary. 175 f. 1
 2 A weakening a man's hand or finger, striking out his eye or foretooth, or castrating him. f. 2
 3 But cutting off an ear, nose, &c. are not *maims*, for it does not *weaken*, but only *disfigures*. *ibid.*
 4 All maim is felony. f. 3
 5 How castration and other maims were anciently punished. *ibid.*
 6 A man who maims himself, either to induce pity, by begging, or to avoid inlisting as a soldier, may be indicted and fined. 176 (N) 1
 7 By 37 Hen. 8. c. 6. to cut off another's ear, otherwise than by law, chance medley, sudden affray, or adventure, forfeits treble damages and 10*l.* to the king. *ibid.* f. 7
 8 By 22 & 23 Car. 2. c. 1. by lying in wait, to cut off or disable any limb, or member of another, *with intent to maim or disfigure him*, or to aid, &c. therein, is felony without clergy. 176 f. 4
 9 But no corruption of blood, loss of dower, or forfeiture, &c. shall ensue. f. 5
 10 If the offender *maims*, he is within the above statute though the primary intention was to *murder*, and not merely to *maim*. f. 6
 11 If the offence be not within the act, the offender may be indicted or appealed for maim, at common law, or an action of trespass (which is most usual) may be brought for damages. (N) 2

- 12 There are no accessories after the fact in maim. *Page 176*

M A I N T E N A N C E.

- 1 Is an unlawful upholding of quarrels, to the hindrance of common right. 535 c. 83
 2 And is either *ruralis*, or assisting one in his pretensions to another's land, &c. in the country, which is punishable by *the king*, with fine and imprisonment. f. 2
 3 Or *curialis*, in a court of justice, by officiously intermeddling in suits no way belonging to the party. f. 3
 4 To assist with money, or to retain counsel for another, *seems* to be maintenance. f. 4
 5 So it is said, that to persuade a counsel to assist another's cause, is maintenance. 536 f. 5
 6 So to open the evidence to the jury, or to give evidence uncalled for, or to speak as counsel, or to retain an attorney, &c. is maintenance. f. 6
 7 So if a powerful patron threaten to spend money in another's cause, &c. f. 7
 8 So if a juror solicit a judge to give judgment, &c. f. 8
 9 But it is not maintenance to give another friendly advice what action to bring, or to recommend an attorney, &c. 537 f. 9
 10 Nor even to give another money before a suit is commenced, except it be given for that purpose. f. 10
 11 But *maintenance* may be as well after judgment, as pending the plea. f. 11
 12 A remainder man, or reversioner, may maintain the suit of the tenant in tail, or for life. 538 f. 12
 13 So the *lessor* may maintain his *lessee*, if the inheritance come in question. *ibid.*
 14 So the alienee may maintain the title of those under whom he claims. *ibid.*
 15 So a lessee, in future, upon a contingency, may maintain those who possess the *term*. f. 13

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- 26 So the heir apparent may maintain the ancestor. *Page 538 f. 14*
- 27 And now since 4 Ann. c. 16. f. 9. which make all attornments needless, the grantee of a reversion may maintain the tenant in possession. *f. 15*
- 28 A *warrantor* is bound to maintain the tenant. *539 f. 16*
- 29 Whoever has an equitable interest, even to a *chose in action* may maintain another in a suit relating thereto. *f. 17*
- 30 So where persons claim a common interest in the same thing, they may maintain each other. *f. 18*
- 31 And he who is bail for another, may interpose to have his appearance recorded, but not further. *f. 19*
- 32 A father, or heir apparent, or the husband of an heiress, may maintain suits respectively—but a godfather cannot advance money, &c. *540 f. 20*
- 33 So the lord, or *cestui que use* of a feignory, may maintain the tenants, &c. *f. 21*
- 34 And the tenant may *stand by* his lord at the trial. *f. 22*
- 35 A master may retain counsel for his servants, and stand by them at the trial, but he cannot speak for them. *541 f. 23*
- 36 But the master cannot lay out money for his servant in *real actions*, as he may do to keep him from gaol in other actions, unless the servant consent that his wages shall be so employed. *ib. d.*
- 37 But a servant cannot lay out his own money in his master's suit. *f. 24*
- 38 A man may go with *his neighbour* to counsel, but he cannot support him with money in his suit. *f. 24*
- 39 But a man may lawfully give money to a poor person to carry on his suit. *f. 24*
- 40 A counsellor may defend his client, but he cannot give him money to support his cause, or threaten a juror in his behalf. *542 f. 27*
- 41 An attorney retained, may conduct his client's causes in the courts of which he is an attorney, &c. but they cannot expend money for another without the expectation of repayment—and, *quære*, if *solicitors* can lay out money for a client. *Page 542 f. 28*
- 42 No counsellor or attorney can justify any deceitful practice in maintaining a client's cause. *f. 29*
- 43 And by stat. West. they may be disqualified, imprisoned for a year and a day, and otherwise punished at the king's pleasure. *ibid.*
- 44 Counsellors, &c. who are not sworn, are equally within the statute. *f. 30*
- 45 All fraud and falsehood tending to impose upon or abuse the court, are within it. *f. 31*
- 46 Or where an attorney sues out a false writ, or brings a *process* against a poor man, &c. or procures judgment without warrant, or pleads a false plea. *f. 32 to 35*
- 47 All maintenance is prohibited by the common law; the offenders are answerable in damages, and may also be indicted and fined and imprisoned. *f. 36*
- 48 A court of record may commit for maintenance in the face of the court.
- 49 By 1 Ed. 3. c. 14. none by sending letters, or otherwise, shall maintain suits and quarrels.
- 50 By 1 Rich. 2. c. 4. maintenance by the king's servants, shall be punished at *his pleasure*—other less officers shall be imprisoned and disqualified, and all other persons by fine and ransom. *544*
- 51 Maintenance in a court baron, is within this act. *f. 39*
- 52 *Nul tiel regard* a good plea to maintenance. *f. 40*
- 53 A person is not liable for taking out an *original* which is never returned. *ib.*
- 54 It is immaterial whether the plaintiff recovered, or was nonsuited. *f. 41*
- 55 Whoever fears that another will maintain his adversary, may have a writ to prohibit him. *f. 42*
- 56 All persons are prohibited from giving badges, &c. for maintenance. *f. 43*
- 57 By 32 Hen. 8. c. 9. none shall maintain any action where any person shall have authority to hold plea of

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- of lands—nor embrace any freeholders, or jurors, or witnesses, on pain of 10*l.* &c. *Page 544 f. 44*
- 48 On information on this statute must alledge that the maintenance was “unlawfully” committed. 545 *f. 45*
- 49 Maintenance of a suit in a spiritual court, is not within any of the above statutes. *f. 46*
- 50 So it must shew that a pled was depending. *f. 47*

MALICE.

- 1 Arson cannot be committed unless the burning be malicious. 167 *f. 5*
- 2 But malice against one shall be construed as malice toward all. *ibid.*
- 3 What shall be construed malice express and implied. 118
- 4 *Malitia a creditur personam.* 103, 113, 126, 132

MALT.

- 1 Whether making corn into malt will alter the property. 139
- 2 Neither malt, nor corn bought to be malted, within the statutes against forestalling. 484

MALUM IN SE.

- 1 Every nuisance is *malum in se* 362 *f. 8*
- 2 Every monopoly is *malum in se*. 471

MANSION HOUSE —*Vide Burglary.*

- 1 *Domus mafionalis* and *messuagium* are equipollent. 283
- 2 In arson it is not necessary to lay the offence as in a *mansion house*, *domus* is enough. 166

MANSLAUGHTER.

- 1 Homicide *without malice* is called manslaughter, and sometimes *ban.e medley*. 115 *c. 30*
- 2 It is that killing which happens either on a sudden quarrel, or in the

commission of an *unlawful act*, without an intention of mischief. *Page 115 f. 1*

- 3 It must be done without premeditation, therefore there can be no accessories before. *ibid. f. 2*
- 4 The special matter cannot be pleaded, but must be given in evidence on the general issue. 105 *f. 3*
- 5 To kill another, who claiming title to a house, attempts to enter it by force, or shoots at it, or who breaks a window to make an arrest, or hedges, after being forbidden—is manslaughter. 108 *f. 23*
- 6 In self defence, where the circumstances would otherwise *justify* the homicide, if the party kill the assailant without apparent necessity, it is manslaughter. 109
- 7 If a husband kill the man, with whom he finds his wife committing adultery it is only manslaughter. 110 (N) 1
- 8 If a workman sling down a piece of timber *in play*, or in the frequented streets, and it happen to kill, it is manslaughter. 111 *f. 4.*
- 9 So if a parent or a master correct a child or a servant in a barbarous or immoderate manner, or make use of an unusual or improper instrument for the purpose. *f. 5*
- 10 Therefore if an officer of the impress service firing at a boat *in the usual manner*, happen to kill, *at night* it is only manslaughter. *ibid.* (N) 2
- 11 If death ensue by shooting at deer in a *third person's park*, or shooting a gun, or throwing stones in a place of public resort, or by doing any idle action likely to create bodily hurt, or playing with swords, or firing pistols in a highway, &c it is manslaughter. 112 *f. 9* (N) 3
- 12 If he who draws upon another in a sudden quarrel, make no pass at him till *his sword* be drawn, and then fight with him and kill him, he is guilty of manslaughter only. 123 *f. 28*
- 13 If two fall out, agree to fight, fetch weapons, and during the heat of blood one kill the other it is manslaughter. 124 *f. 29*
- 14 *in-*

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- 14 Indulgencies are shewn to the frailties of human nature. *Page* 124 f. 30
- 15 But no infidelity; trespass, words, gestures, or provoking circumstances, however malicious or aggravated will reduce the crime of murder to manslaughter. f. 33
- 16 But upon such provocation if it plainly appear that he meant only to chastise, and not to kill—or if he had restrained himself till the other was on his guard, and then in fighting kill, it is only manslaughter. 125
- 17 So also if one, seeing two fight, takes part with one of them and kills the other—or where a man finding a man in bed with his wife, or being actually struck by another, or pulled by the nose, &c. immediately kills him. f. 35, 36
- 18 It has been held manslaughter only to kill another in contending for the wall; or in defence of his person from an *unlawful* arrest, or of his house from a forcible entry; or if the possession of a public room; or to revenge an injury done to a child; or in ducking another as a *pick-pocket*; or in defence of national character, &c. 125 f. 36, 37 and (N) 1
- 19 If a third person happen to be killed by one engaged in a combat with another, it is manslaughter only. 127 f. 44, 45
- 20 If a servant seeing his master engaged, take his part and kill the adversary it is manslaughter only. 128 f. 49, 50
- 21 If an officer be killed in attempting to execute an *unlawful* writ, it is only manslaughter. 130 (N)
- 22 By 1 Jac. 1. c. 8. a certain species of manslaughter converted into murder, (*vide Murder. No.*) 115 to 117

MANUFACTURER.—*Vide Artificer.*

MARINER.—*Vide Piracy.*

- 1 How mariners in the king's fleet, are punishable for sodomy. 10

- 2 How for profane cursing and swearing. *Page* 12, 13
- 3 Mariners burning any magazine of powder, or any vessel, or boat, or the tackle or furniture, shall suffer death. 76
- 4 By 39 Eliz. c. 17. idle mariners wandering against the injunctions of this act, shall suffer as felons without clergy. 183, 184
- 5 By 17 Geo. 2. c. 5. persons begging as mariners, shall be deemed rogues and vagabonds 184
- 6 If any mariner, &c. shall wilfully destroy the ship, &c. &c. to which he belongs, shall suffer death without clergy. 185, 186

MARKET TOWN.—*Vide Highway. Engraving.*

MARRIAGE.

- 1 By 3 Hen. 7. c. 2. whoever shall take away and defile, or marry any woman having substance, for lucre thereof, against her will, and to her disparagement, or abet the same, or receive the woman, shall be guilty of felony. 171
- 2 By 39 Eliz. clergy is taken from principals and accessaries before. f. 52
- 3 The several determinations made upon these acts. f. 3 to f. 10
- 4 By 4 & 5 Phil. & Mary c. 8. whoever shall allure a girl under 16 and unmarried from her guardians, shall be fined and imprisoned two years. 172 f. 10
- 5 If the seducer deflower or marry her, he shall suffer 5 years imprisonment, and fine at discretion. *ibid.*
- 6 If any female above 2 years of age consent to unlawful matrimony, she shall forfeit all her lands to the next of kin, &c. 172, 173
- 7 Various determinations upon this statute. 173 (N) 2
- 8 By 26 Geo. 2. c. 33. to solemnize matrimony in any other place than where banns have been usually published, unless by special licence, and except

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- except the parties are Jews or Quakers, &c. is felony and transportation 14 years. *Page 173 f. 11*
- 9 To counterfeit, alter, or destroy any marriage register, is death, without clergy. *f. 12*
- 10 The forfeiture for a popish marriage. *34 37*

MARSHAL.—*Vide Constable. Murder.*

MASTER.

- 1 Not justified in beating his servant in a cruel and barbarous manner or with an improper instrument. *111*
- 2 A mistress is included under the word "master," in 25 Edw. 3. respecting petty treason. *132*
- 3 A master chastising a servant in actual service, is not an assault, for which a recognizance of the peace shall be forfeited. *259*
- 4 A servant may justify beating another in defence of his master. *260*
- 5 How far a master may maintain his servant. *541*

MASS.

- 1 By 23 Eliz. c. 4. to say or sing mass, incurs a forfeiture of 200 marks, and to hear mass, 100 marks and a years imprisonment. *39*
- 2 By 11 & 12 Will. 3. c. 4. whoever shall apprehend a popish priest for saying mass, shall receive 100*l.* and the offender shall suffer perpetual imprisonment. *ibid.*
- 3 But by 18 Geo. 3. c. 60. this punishment is repealed, provided the offender takes the oath therein prescribed. *ibid.*

M E A L.—*Vide Bread.—Baker.*

M E M B E R.—*Vide Maim.*

MESSUAGE.—*Vide Burglary.—Forcible Entry.*

M I L E S.—*Vide Computation.*

M I L L E R.

- 1 In what case a miller may be guilty of larceny *Page 135*

M I L L S.

- 1 By 9 Geo. 3. c. 29. maliciously to burn or destroy any mill, is felony without clergy. *224*
- 2 Riotously and tumultuously to demolish or begin to demolish any mill or the works thereto belonging, is felony without clergy. *309*

M I N E S.

- 1 To steal property from mines not larceny by the common law, because of its adherence to the freehold. *141, 142*
- 2 All mines of gold and silver belong to the king, *70*
- 3 By 25 Geo. 2. c. 10. to break into any black lead mine, or into any pit or shaft, or unlawfully to take away any lead from a mine, without forcibly entering it, is whipping, &c. or transportation. *248*
- 4 By 9 Geo. 3. c. 29. to damage or destroy mine engines, is transportation for seven years. *238*
- 5 How far the king may grant an exclusive right to allum mines *475*

MISBEHAVIOUR.—*Vide Behaviour.*

MISCHANCE.—*Vide Homicide. Murder. Manslaughter.*

- 1 A hurt by mischance forfeits not a recognizance for the peace; but it is no excuse in a civil action. *260. f. 27*
- M I S-**

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MISPRISION.—*Vide Thefbote.*

- 1 Misprision signifies all such high offences, as are nearly bordering upon capital. *Page 86 c. 20*
- 2 A misprision is contained in every treason or felony. *ibid.*
- 3 The king may proceed for the misprision only. *ibid.*
- 4 Misprision is either negative or positive. *ibid.*
- 5 Misprision of treason consists in the bare knowledge or concealment of high treason. *f. 2*
- 6 What species of assent will convert misprision into high treason. *f. 3, 4, 5*
- 7 A person who is *only told* that there will be a rebellious rising without he *knows* of the circumstances, is not bound to make discovery of such information. *87 f. 6*
- 8 By 13 Eliz. c. 2. to forge foreign coin not current, or to aid therein, is misprision of treason. *f. 7*
- 9 Those who *barely utter* false money knowingly, were only guilty of a *misprision* at common law. (*Vide coin.*) *62 f. 56*
- 10 Misprision of felony is the concealment, or procuring the concealment of a felony, either by common law or statute. *251 f. 2*
- 11 Silently to observe the commission of felony, is misprision. (N) 1
- 12 Concealment of *treasure trove* is misprision of felony. *ibid.*
- 13 By 3 Edw. 1. c. 9. officers procuring or concealing felonies done in their liberties, or who will not arrest the offenders, shall be imprisoned one year, and make grievous fine, or suffers three years imprisonment. *f. 3*
- 14 By 3 Hen. 7. c. 1. an inquest may be taken to enquire of concealments, &c. *f. 4*
- 15 Causing an abortion is only a high misprision. *121 f. 16*

M I S T A K E.

- 1 Cannot amount to a felonious intention *99 f. 3*

MIXTURE.—*Vide Bullion. Coin.*

M O N E Y.—*Vide Coin.*

M O N K E Y.

- 1 No felony to steal a monkey. *P. 143*

M O N O P O L Y.

- 1 Monopoly is a grant from the king of the exclusive right of property in any thing. *470 f. 1*
- 2 It only differs from ingrossing, in that the one is the grant of the king, and the other the act of the subject. (N) 1
- 3 Both monopoly and ingrossing are equally restrained by the common law. *ibid.*
- 4 All such grants are void and the person who procures them is liable to be fined. *470*
- 5 Because they are against the freedom of trade, and detrimental to the publick. *f. 2*
- 6 But the king may institute mercantile fraternities, with power to make bye laws for the regulation of, not to restrain trade. (2)
- 7 But he cannot grant the sole importation of any particular merchandize. *471*
- 8 Nor give individuals an exclusive right to trade within certain limits. (1)
- 9 For nothing but an act of parliament can restrain the freedom of trade. *ibid.*
- 10 An exclusive grant of the sole ingrossing of wills or making pleas, writs, &c. &c. is void. *f. 4*
- 11 Or of making, importing, and selling playing cards. *f. 5*
- 12 But the king may grant for a reasonable time, the sole property of any new invention. *f. 6*
- 13 Or the sole use of some particular employments, as printing the holy scriptures, law books, &c. *ibid.*

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- 14 The reason of this privilege. Page 471 N) 4
- 15 Monopolizers were liable to fine and imprisonment. f. 7
- 16 By 21 Jac. 1. c. 3. all grants of monopolies or proclamations tending thereto are declared void. 472
- 17 Corporations disabled to put any such grants in force. f. 9
- 18 All such grants, &c. shall be tried by the rules of the common law. f. 10
- 19 The trial must be in the courts of common law, and not in chancery, or in the council. f. 11
- 20 Therefore chancery will never establish a right under a charter from the crown, until the validity of such charter has been tried at law. (N) 5
- 21 But the court of chancery will cancel letters patent. ibid.
- 22 The use of the king's name, in *scire facias*, to repeal letters patent is of common right. ibid.
- 23 The effect and extent of patents can only be tried in the king's courts. ib.
- 24 Any person injured by the grant of a monopoly, may sue for treble damages at law. 473
- 25 If any person after notice of such action grounded on 21 Jac. shall obtain an injunction, or after judgment shall stop execution, he shall incur a *præmunire*. ibid. f. 13
- 26 But this shall not extend to letters patent for 14 years to the authors of new inventions, provided such letters be not contrary to law, or of pernicious tendency. f. 14
- 27 The invention must be substantially new, and not an improvement only. 474
- 28 And *quære* if an invention which tends to destroy the necessity of manual labour can be the subject of a patent. f. 16
- 29 No old manufacture can be prohibited, or granted by a patent as for a new invention. f. 17
- 30 But the 21 Jac. c. 3. shall not extend to prejudice the privileges of corporations, &c. f. 19
- 31 Nor to any grants concerning the digging, making or compounding of salt-petre or gunpowder; or the casting of shot for ordnance; or to offices in being *and execution* before the statute not suppressed by proclamation. Page 475
- 32 By 16 Car. 1. c. 21. all persons natives or aliens, may import gunpowder, and all subjects may make and sell gunpowder or any of its ingredients, and if any persons shall pretend an authority to the contrary, he shall incur a *præmunire*. f. 21 & 23
- 33 But by 21 Jac. 1. this shall not extend to any grant, &c. for digging allum mines or the making allum,—nor to licences for taverns selling wines, &c. f. 22
- 34 By 8 Ann. c. 19. the author of any book and his assigns, shall have an exclusive right to print the same for 14 years from the day of the publication. f. 24
- 35 And whoever shall print, or import, or expose to sale the same without the author's written consent, signed in the presence of two witnesses, shall forfeit 1*l.* a sheet. 466
- 36 A musical composition, an ingenious abridgment; a useful index, &c. are secured to the author by this statute. (N)
- 37 But the books so intended to be protected by this act, must be entered at Stationers Hall. f. 25 & 26
- 38 And after the said 14 years the right of printing, &c. shall return to the authors, *if living*, for a further term of 14 years. f. 27
- 39 The case of literary property considered. (N) 7
- 40 The manner in which an author must assign his right with respect to the *contingent interest*. ibid.
- 41 By 8 Geo. 2. c. 13. engravings are secured to their proprietors for 14 years. f. 28
- 42 But to secure the property the proprietor's name *and* the day of *first* publishing the print, must not only be engraved on the plate but printed on the print. (N) 1

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- 43 And whoever shall offend against this act, shall forfeit 5 s. for every engraving. *Page 478*
 44 But this act shall not extend to the purchasers of plates. *ibid.*
 45 By 17 Geo. 3. c. 57. Proprietors of prints may recover damages and double costs against those who shall copy them without consent. *ibid.*
 46 By 15 Geo. 3. c. 53. the universities of Great Britain, and the colleges of Eaton, Westminster, and Winchester, shall have the exclusive right to print their own books at their own printing-presses. *f. 29*

M O N T H—*Vide Computation.*

MOSS TROOPERS.—*Vide Borderers.*

M U L T I P L I C A T I O N.

- 1 Of gold and silver, or practising to find out the philosopher's stone, was formerly felony. *73, 14*

M U M.—*Vide Public Houses.*

M U R D E R.

- 1 Felonious homicide *with malice*, is either MURDER, or petty treason. *117. c. 31.*
 2 Murder anciently signified the *private* killing of a man. *f. 1*
 3 The *open wilful* killing was called voluntary homicide. *ibid.*
 4 The law concerning *Engleschire*. *f. 1 & 2*
 5 How a pardon of murder must be worded. *f. 2*
 6 By 23 Hen. 8. c. 1. all wilful murder of *malice prepense* excluded from the benefit of clergy. *ibid.*
 7 MURDER is the *wilful* killing of another through *malice aforethought*. *118*
 8 Whenever death is caused by an act done with a *murderous intent* it makes the offender a murderer. *103*

- 9 Whenever a person who kills another acts upon malice, however coloured by the *appearance of necessity*, it is murder. *Page 105 f. 2*
 10 Whether facts amounting to justifiable homicide may be specially pleaded to an indictment or appeal of murder. *ibid. f. 3*
 11 How far the judge who passes sentence must have jurisdiction over the offence, and in what manner the officer must pursue the judgment, in executing a convict, to avoid the guilt of murder. *105, 106*
 12 It is justifiable to kill a man who is attempting to murder. *109, 110*
 13 If a parent or master destroy the existence of a child or servant by unmerciful and barbarous correction, or by using an instrument improper and likely to occasion death—it is murder. *111 f. 5*
 14 Homicide done in the execution of an *unlawful and malicious* act is murder. *112 f. 10*
 15 Accidentally to kill a man by shooting at poultry *with intent to steal* them is murder. *112, 113*
 16 It is murder to kill, by going *deliberately* with a horse used to strike, or by discharging a gun among a *course* of people; or by throwing a stone or a piece of timber from a house into a *frequented* street, &c. *113 f. 12*
 17 If a man strike another upon malice prepense, and then fly to the wall and there kill him; yet he is guilty of murder. *113 f. 17*
 18 By 1 Jac. 1. c. 8. where any person shall stab another, *that hath not then any weapon drawn*, or that hath not then *first stricken*; and the person stabbed shall die thereof within six months, the person stabbing shall lose the benefit of clergy, though no malice aforethought be proved. *115, 116*
 19 The several constructions which have been made upon this act. *116, 117*
 20 Homicide may be committed not only by those means which are *directly* mortal, but also by such as only *probably*

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- bably and eventually will occasion death. *Page* 118 f. 4
- 21 As exposing a sick man to the inclemency of winter; or a child to the ravages of a bird of prey; or an innocent man to the false accusations of another, on which he is condemned and executed; or to incite a madman either to destroy his own life or that of another; or to lay poison for one man and it is taken by another; or to place a prisoner in a room with another who has an infectious disease; or to destroy the constitution by denying a prisoner the decencies of nature, &c. &c. And *perhaps* by suffering a mischievous animal to roam abroad. f. 5, 6, 7, 8 & (N) 10
- 22 But no person, by any act, shall be said to kill another unless he die within a year and a day. 119
- 23 How the year and day shall be computed. *ibid.*
- 24 If the person die within the year and day it shall be no excuse that he might have recovered if he had been taken proper care of. 119 f. 10
- 25 Where the wound and death are both out of the kingdom, or the one in the kingdom and the other abroad, it could not be tried by the common law; but this is remedied by 2 Geo. 2. c. 21. 119, 120
- 26 Death in England of a wound given abroad, may be examined by the constable and marshal, and by 23 Hen. 8. c. 23. if examined by the privy council, the principals may be tried in any county by commissioners. 119 f. 11
- 27 A murder at sea anciently cognizable by the civil law. f. 12
- 28 Now by 27 Hen. 8. c. 4. & c. 15. it may be tried before the king's commissioners, according to the common law. 119, 120
- 29 How the killing of one who dies at land of a wound received at sea shall be tried. 120
- 30 By 2 & 3 Edw. 6. c. 24. where the wound is given in one county and the death happens in another, it is triable where the death happens. 121
- 31 By 26 Hen. 8. c. 6. a murder in Wales may be tried in the next English county. *Page* 121 f. 14
- 32 The malicious killing of any person, whatsoever nation or religion he be of, or of whatsoever crime attained is murder. f. 15
- 33 Causing an abortion was anciently held to be murder. f. 16
- 34 At this day it is only a great misprision, &c. &c. *ibid.*
- 35 But where one counsels a woman to kill her unborn child and she does it accordingly when it is born, he is an accessory to murder. 121 f. 17
- 36 And by 21 Jac. 1. c. 27. to conceal the birth of a dead bastard child shall be evidence of having murdered it. *ibid.*
- 37 Any formed design of doing mischief may be called malice. 121, 122
- 38 Where two persons meet on a precedent quarrel, in cool blood, and fight and one of them is killed this is murder 122 f. 21
- 39 And in duelling wherever the circumstances afford the presumption that the blood was cool at the moment of the homicide it is murder. f. 22, 23
- 40 No pretence under which malice may be covered shall elude the justice of the law. 123, f. 24, 25
- 41 If a man assault another with malice, and then fly, but on being followed kill his antagonist, it is murder. f. 26
- 42 To resent provocation in a manner manifestly endangering life, is murder if death ensues. f. 27
- 43 In duelling not only principals but seconds also are guilty of murder if the fight prove fatal. 124 c. 21
- 44 No words, gestures, &c. will excuse from the guilt of murder. f. 33
- 45 Death occasioned by beating another deliberately and vindictively is murder, although death was not intended. 126, f. 38, 39
- 46 Wherever a man happens to kill another in the execution of a deliberate purpose to commit a felony, he is guilty of murder. 126, f. 41
- Z z 2
- 47 So

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47 So also it is murder where not only the act of felony *immediately* causes the death, but where it occasionally causes such a misfortune. *Page* 126

c. 42

48 To kill a magistrate, &c. who *interposes* in a quarrel in order to suppress it, is murder. 127, 128 f. 44,

48

49 Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing happen to kill a man, they are all guilty of murder. f. 46

50 But the fact must appear to have been committed strictly in prosecution of the purpose for which the party were assembled. 128

(N) 3

51 How far a person may alleviate murder, by interposing to release another from *unlawful* confinement. 129

52 To kill a sheriff or any of his officers, in the *lawful* execution of civil process is murder, although the process be erroneous. 129 f. 55, 56

53 How far homicide in an attempt to usurp unlawful authority, shall be construed murder. 130 f. 59

54 Death occasioned by any idle wanton action, likely to endanger life, is murder. f. 60

55 A physician or surgeon, whose ignorant administration of medicine, may have occasioned the death of the patient, is not thereby guilty of murder: tho' anciently held otherwise. 131

M U T E.

1 By 12 Geo. 3. c. 20. standing mute in felony or piracy, either on an indictment or appeal, amounts to conviction. 154

N.

NAVAL STORES.

1 BY 9 & 10 Will. 3. c. 41. no persons, except the officers authorized by the king shall make cordage of more than three inches, with a *white thread*—or of less than three *with a twine* laid the contrary way—nor any canvas with a *blue streak*—or any other stores with *the broad arrow*, on pain of forfeiting the goods and 200*l.* *Page* 562

2 Whoever shall have the possession of such stores, without a certificate, &c. shall forfeit 200*l.* f. 2

3 The commissioners who sell old stores, may grant such certificate to buyers, who may also grant the same to those who purchase again. 563 *ibid.*

4 Whoever shall counterfeit, or produce a false certificate, shall be bound over, by the commissioners, to the quarter sessions. f. 3

5 The manner in which any person prosecuted for executing this act may be defended. f. 4

6 By 9 Geo. 1. c. 8. this offence is extended to timber, thick stuff, and plank. f. 5

7 The court may mitigate the penalties, and settle the distribution of them. f. 6, 7

8 Power given to judges of assize, or justices at session, to determine the offence, and mitigate the penalty to public whipping and hard labour for three months. 564

9 By 9 Geo. 3. c. 30. the officers of the king's yards, and the commissioners of the navy, are authorized to act as justices of the peace, in apprehending, &c. offenders. f. 9

NAVIGABLE RIVERS.

1 To destroy any lock, sluice, or flood-gate erected thereon by authority of parliament, is transportation. 199 f. 1

2 By 8 Geo. 2. c. 20. the same offence visited of clergy. *ibid.* f. 3

3 To

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- 3 To draw up any floodgate, on any wear upon a navigable river, is hard labour for a month. Page 199 f. 4
- 4 To draw up piles, &c. for securing any marsh or sea banks, incurs a *quintum* penalty of 20*l.* &c. *ibid.* f. 5
- 5 The punishment and regulations of the black act extended to cases of destroying sea banks. 200
- 6 To break the bank of any river whereby lands shall be overflowed, is felony without clergy. *ibid.* f. 7
- 7 To destroy the *Bedford Level*, felony without clergy. *ibid.* f. 8
- 8 By 4 Geo. 3. c. 12. to destroy the works upon any navigation, so as to impede the carrying on of the same, is transportation. *ibid.* f. 9
- 9 Offences by obstructing of havens; by bumb boats on the Thames; and by thefts on navigable rivers. *ibid.* (N)

NECESSITY.

- 1 Necessity, however extreme, is no *legal* excuse for stealing, 141 f. 20
- 2 Where necessity will excuse the coming of a popish priest into the realm. 68, 69
- 3 How far necessity is an excuse for crimes. 5 (N)
- 4 To what extent it must arise to excuse high treason. 54 (N) 3
- 5 How far necessity will justify, excuse, or alleviate homicide, &c.
- 6 In what cases it shall excuse a nuisance. 363, 404

NEIGHBOUR.

- 1 How far one neighbour may maintain another. 541 f. 25
- 2 Where one is guilty of nuisance by incommoding his neighbour. 362, 363
- 3 Where the neighbouring towns must cleanse a river. 365

NETS.—*Vide Fish.*

NIGHT.—*Vide Burglary. Cattle.*

NIGHT-WALKERS.

- 1 They may be bound to their good behaviour. Page 262

NOBLEMAN.

- 1 May keep an unlicensed tutor in his house. 18

NOSE.—*Vide Maim.*

NON-CONFORMITY.—*Vide Church Dissenters.*

NON-COMPOS.—*Vide Madmen.*

- 1 An offender, becoming so before conviction, shall not be arraigned; nor, if after an arraignment shall he be tried, and if after conviction he shall not be executed. 2 f. 2
- 2 But he shall answer for a trespass against the person or possession of another. 3 f. 5.
- 3 A person becoming *non compos* by voluntary drunkenness, shall be punished for his crimes, the same as if he were sober, unless the intoxication has permanently disordered the understanding. 3 f. 6

NON-JUROR.—*Vide Oaths.*

NON FEASANCE.

- 1 An offence consisting of a *non-feasance* needs no *venue*. 20 f. 5
- 2 In what case a non-feasance will amount to a forcible entry, though not to a forcible detainer. 280, 281
- 3 A man cannot commit an act of forgery by a bare non-feasance. 337 f. 6

NON-USER.

- 1 Whether it be a ground for discharging an officer. 311

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NOTICE.

A TABLE OF PRINCIPAL MATTERS.

NOTICE.

- 1 It is implied in all penal statutes, that the defendant must have notice of the accusation against him. *P. 420 f. 83*

NORTHERN BORDERS.—*Fide* *Rioters.*

N U I S A N C E.

- 1 A common nuisance is an offence against the public by doing any thing injurious to *all* the king's subjects, or by omitting to do that which the common good requires. *360 c. 75*
- 2 Therefore *private* annoyances, are not the subject of *public* prosecution, the injury must be repaired in a *civil* action. *f. 2*
- 3 Consequently where the indictment charges the damage of private persons only, it is bad. *361*
- 4 It must be laid *ad commune no. men- tum*; unless the subject necessarily imports a public grievance. *f. 4; 5*
- 5 The indictment of a common scold must be *communis rixatrix*. *f. 5*
- 6 Common bawdy-houses are indictable as common nuisances. *362 f. 6*
- 7 So rope-dancing, common gaming-houses, unlicensed play-houses. *f. 7*
- 8 But neither an old, nor a new dove-cote are nuisances; for the erecting them may be justified by prescription, &c. *f. 8*
- 9 And a gate across a highway which has so continued time out of mind is no nuisance, for the prescription shall be intended.—But a new gate so erected may be abated as a nuisance. *f. 9*
- 10 Tallow boilers, brewhouses, glass-houses, twine-yards, a manufactory for acid spirit of sulphur, &c. erected in improper places, may be nuisances. *f. 10*
- 11 To divert the course of a navigable river, and perhaps to multiply inmates during the prevalence of a contagion, are nuisances. *f. 11*
- 12 To disturb the neighbourhood with a blowing trumpet, to suffer a house to grow dangerously ruinous, &c.

p. 369.) to obstruct the intercourse of a public river, to damage a public highway, to put an improper ship into Billingsgate dock, are nuisances.

Page 363 (N) 1

- 13 But an hospital for inoculation is not a nuisance, nor to lay bricks in a private fishery in the Thames, nor to violate a public law, nor to obstruct a prospect. *ibid.*
- 14 And *quere* if a coney burrow is a nuisance. *ibid.*
- 15 By 9 & 10 W. 3. c. 7. to make or let off fireworks publicly, is a nuisance. *364*
- 16 By 9 & 10 Will. 3. c. 17. all private lotteries, &c. are public nuisances. *ibid.*
- 17 By 6 Geo. 1. c. 18. f. 19. all public bubbles are nuisances. *ibid.*
- 18 Any one may pull down a common nuisance. *f. 11*
- 19 And may justify a *trespass* for that purpose. *365*
- 20 And the plea need not state that the party did as little damage as possible. *ibid.*
- 21 Those who have the fishery of a river, or those who have a passage or easement therein, shall be obliged to abate a nuisance on such river, if none are bound to do it by prescription. *f. 11*
- 22 A common scold is punishable by the ducking-stool. *f. 14*
- 23 The punishment of common nuisance is fine and imprisonment. *ibid.*
- 24 And the offender shall be ordered by the judgment to abate the nuisance at his own costs. *ibid.*
- 25 NUISANCES TO HIGHWAYS. *366 and 404*
- 26 Are punishable by indictment in the court leet. *ibid. f. 1*
- 27 A common river is a highway. *ibid.*
- 28 A thoroughfare is a highway. *ibid.*
- 29 Nuisances in highways are not punishable by action. *ibid.*
- 30 Every way from town to town may be called a highway. *ibid.*
- 31 To dig a ditch, or make a hedge athwart a highway, or to lay logs of wood therein, even though a passage may be obtained by winding, and cuttings

A TABLE OF PRINCIPAL MATTERS

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| <p>turnings through them, or doing any other act which renders the passage incommodious, or by suffering the ditches to be foul, or boughs to overlay the road are nuisances. <i>Page</i> 404</p> <p>32 But it is no nuisance to unload billets, unless they are suffered to remain an unreasonable time. <i>ibid.</i></p> <p>33 To nuisances to highways by THE STATUTE, <i>vide</i> Highways, No. to No.</p> <p>34 An heir may be indicted for a nuisance begun by his ancestor and continued by him. 408 f. 61</p> <p>35 An indictment for a nuisance must shew where it was done. 421 f. 87</p> <p>36 But it is not necessary to mention the <i>termini</i> of the highway in which it was done, nor where there are two villis is it necessary to shew in which it lies. (N) 20</p> <p>37 For other matters relative to the necessary allegation of the indictment. 412</p> <p>38 Nuisances to turnpike roads. 437 f. 48</p> <p>39 Nuisances to bridges. 443</p> | <p>5 By 2 Geo. 2. c. 31. and 9 Geo. 2. c. 26. all officers, civil and military, shall take the oaths of allegiance, supremacy, and abjuration. <i>Page</i> 16</p> <p>6 By 11 Geo. 1. c. 4. officers of corporations shall take the oaths by law required, at the time of their admission. &c. <i>ibid.</i></p> <p>7 By 25 Car. 2. c. 2. all officers, civil and military, except of inheritance appointing deputies; and all who have any fee, &c. by patent, except such as do not relate to any place of trust; and all who have employ in the king's house, shall take the oaths of allegiance, supremacy, and test, &c. upon pain of disability and forfeiture of 500<i>l.</i> &c. 16, 17</p> <p>8 Construtions and cases upon this act. <i>ibid.</i></p> <p>9 The above act shall not extend to constables or churchwardens, or such like inferior civil officers, or to a bailif of a manor, or such private officers, 17 f. 4</p> <p>10 By 5 Eliz. c. 1. clergymen and recusants refusing a second tender of the oaths, are guilty of high treason. 69 f. 84</p> <p>11 By 1 Eliz. c. 1. 5 Eliz. c. 1. 3 Jac. 1. c. 4. 7 Jac. 1. c. 6. 1 W. & M. c. 8. and 7 Will. 3. c. 24. all ecclesiastical persons, temporal officers, and certain other persons in any public employ, shall take the oaths or be liable to the penalties of <i>praemunire</i>. 81 f. 27 to p. 84 f. 44</p> <p>12 Several determinations upon the above statutes. <i>ibid.</i></p> <p>13 By the common law, all laymen above the age of 12 years, are bound to take the oaths of allegiance. 94 f. 3</p> <p>14 The reason of this obligation. 94. 95</p> <p>15 The reason for requiring the oaths of allegiance and supremacy. 95 f. 4</p> <p>16 By 1 W. & M. c. 8. the penalty of 40<i>s.</i> or three months imprisonment, is inflicted on those who shall refuse a tender of the oaths, and if they refuse at the end of the three months, a further penalty, &c. 95, 96</p> |
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O.

O A T H S.

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| <p>1 BY the corporation act 13 Car. 2. c. 1. no member of any corporation shall be eligible, who shall not have received the sacrament within one year before his election. 15.</p> <p>2 Every member of any corporation shall take the oaths of allegiance and supremacy, with the oath of office, or the election shall be void. <i>ibid.</i></p> <p>3 But by 5 Geo. 1. c. 6. all persons required to take the said oaths, or to subscribe the declaration, shall be confirmed in their offices, notwithstanding their omission so to do. <i>ibid.</i></p> <p>4 And all persons in office required to take the sacrament, shall not be incapacitated by omission after six months. 15, 16</p> | <p>5 By 2 Geo. 2. c. 31. and 9 Geo. 2. c. 26. all officers, civil and military, shall take the oaths of allegiance, supremacy, and abjuration. <i>Page</i> 16</p> <p>6 By 11 Geo. 1. c. 4. officers of corporations shall take the oaths by law required, at the time of their admission. &c. <i>ibid.</i></p> <p>7 By 25 Car. 2. c. 2. all officers, civil and military, except of inheritance appointing deputies; and all who have any fee, &c. by patent, except such as do not relate to any place of trust; and all who have employ in the king's house, shall take the oaths of allegiance, supremacy, and test, &c. upon pain of disability and forfeiture of 500<i>l.</i> &c. 16, 17</p> <p>8 Construtions and cases upon this act. <i>ibid.</i></p> <p>9 The above act shall not extend to constables or churchwardens, or such like inferior civil officers, or to a bailif of a manor, or such private officers, 17 f. 4</p> <p>10 By 5 Eliz. c. 1. clergymen and recusants refusing a second tender of the oaths, are guilty of high treason. 69 f. 84</p> <p>11 By 1 Eliz. c. 1. 5 Eliz. c. 1. 3 Jac. 1. c. 4. 7 Jac. 1. c. 6. 1 W. & M. c. 8. and 7 Will. 3. c. 24. all ecclesiastical persons, temporal officers, and certain other persons in any public employ, shall take the oaths or be liable to the penalties of <i>praemunire</i>. 81 f. 27 to p. 84 f. 44</p> <p>12 Several determinations upon the above statutes. <i>ibid.</i></p> <p>13 By the common law, all laymen above the age of 12 years, are bound to take the oaths of allegiance. 94 f. 3</p> <p>14 The reason of this obligation. 94. 95</p> <p>15 The reason for requiring the oaths of allegiance and supremacy. 95 f. 4</p> <p>16 By 1 W. & M. c. 8. the penalty of 40<i>s.</i> or three months imprisonment, is inflicted on those who shall refuse a tender of the oaths, and if they refuse at the end of the three months, a further penalty, &c. 95, 96</p> |
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- 17 It is in the option of government to adopt the milder punishment inflicted by this act, or the more severe one inflicted by the former statutes. *Page* 96
 - 18 The reason of enjoining the oath of abjuration. *ibid.* l. 6
 - 19 By 1 Geo. 1. c. 13. all officers civil or military, or in the service of the royal family, all ecclesiastics, members of colleges, of 18 years of years of age—and all school-masters, preachers, high constables, and lawyers, shall, within three months after admittance, &c. take the oaths of allegiance, supremacy, and abjuration, or be disabled in law, &c. and forfeit 500*l.* 97
 - 20 Any two justices, &c. may tender the oaths, and on refusal, the offender shall be adjudged a popish recusant convict. 98
 - 21 How the members of the universities shall take the oaths, and what punishment they shall suffer. *ibid.* l. 9
 - 22 No peer shall vote or make proxy, or sit in the house, nor any member in the house of commons, until he shall have taken the said oaths. l. 10
 - 23 The oaths which the law requires to be taken previous to being naturalized. *ibid.* (N)
 - 24 The oaths required to be taken by the peers of Scotland. *ibid.*
 - 25 By 22 Geo. 2. c. 30. the form of the Moravian affirmation is prescribed. *ibid.*
 - 26 By 1 Will. 3. c. 18. and 8 Geo. 1. c. 6. the form of the Quakers profession and affirmation prescribed. *ibid.*
 - 27 Money delivered in consequence of an oath, extorted by fear, is robbery. 148
 - 28 He that demands surety of the peace must shew his grievance upon oath. 254
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- ### OBSCENITY.
- 1 Obscenity, tending to subvert religion and morality, punishable by indictment at common law. 10
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- 2 Obscene writings *formerly* held not libellous. *Page* 355
 - 3 The author of obscene writings may be bound to his good behaviour. *ibid.*
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- ### OCCUPIERS.—*Vide Highways. Burglary. Arson.*
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- ### ODIO et ATIA.
- 1 A man committed for homicide might, anciently, sue out *de odio et atia*, 114, 115
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- ### OFFENCE.—*Vide Church. Crimes. Riot.*
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- ### OFFICE and OFFICERS.—*Vide Conformity.*
- 1 In what cases an office becomes forfeited by negligence, non-user or corruption. 310, 311
 - 2 Public offices are not to be bought or sold. 312
 - 3 How officers shall be punished for concealing offences. 251
 - 4 What officers are bound to receive the sacrament. 15
 - 5 Recusants are disabled to hold an office. 29, 34, 38, 40
 - 6 How far execution must be performed by proper officers. 106
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 - 8 In what cases officers are protected in the execution of their duty. 117 c. 31, *passim*.
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- ### ORCHARDS.—*Vide Freehold.*
-
- ### ORDERS.—*Vide Clergymen. Common Prayer. Highways.*
-
- ### OVERT ACT.—*Vide Treason.*

OUT

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OUT BUILDINGS.—*Vide Burglary.*

OWLING.—*Vide Exportation.*

P.

PACKET.—*Vide Letters. Post Office.*

PALACE.—*Vide infra.*

PALLISADES.—*Vide Fences.*

- 1 **BY** 4 Geo. 2. c. 32. whoever shall break, with intent to steal, any iron pallisade, or other iron, fixed to any dwelling, or to any out-house, used with such dwelling, or to any orchard or yard, &c. or shall aid or assist in so doing, shall be guilty of felony. Page 218
- 2 A church is within this act, *ibid.*

P A P I S T S.

- 1 By 3 Jac. 1. c. 5. popish recusants convict are *disabled* in law as persons excommunicated, except the action concern some hereditament not seized by the king. 32, 33
- 2 By 1 Jac. 1. c. 4. this disability continues only till they conform according to the 23 Eliz. c. 1. and 28 Eliz. c. 6. 33 (N)
- 3 How a defendant shall take advantage of an action by such disabled papist. 33 f. 2 to 7
- 4 By 1 W. & M. c. 26. and 12 Ann. c. 2. papists are *disabled* to present to a church. 33 f. 7 and p. 44, 45
- 5 But he continues patron to all other purposes than that of presentation. 45 f. 10
- 6 By 3 Jac. 1. c. 5. papists are *disabled* from bearing any public charges, or office in the state. 34
- 7 Observations upon this clause. *ibid.*

- 8 By 3 Jac. 1. c. 5. a female papist is *disabled* from claiming any part of a husband's personal estate, or any estate by way of courtesy or dower. Page 34 f. 10, 11
- 9 By 35 Eliz. c. 2. papists are *restrained* from going above five miles from home, without licence. 35
- 10 Who shall grant, and how such licence shall be pleaded. *ibid.*
- 11 By what computation the distance shall be reckoned. *ibid.*
- 12 By 3 Jac. 1. c. 5. and 30 Car. 2. c. 5. papists are *restrained* from appearing at court. 35
- 13 By 3 Jac. 1. c. 5. papists are *restrained* from keeping arms, and from coming within ten miles of London. 36
- 14 By 3 Jac. 1. c. 5. feme covert papist, whose husband is not convicted of recusancy, who shall not conform within one year, shall forfeit two parts of her jointure. 37
- 15 By 3 Jac. 1. c. 5. a papist who has conformed, who shall not receive the sacrament within one year shall forfeit 20*l.* for the first, 40*l.* for the second, and 60*l.* for every other year. *ibid.*
- 16 By 3 Jac. 1. c. 5. every papist who shall marry otherwise than according to the church shall forfeit 100*l.* *ibid.*
- 17 By 3 Jac. 1. c. 5. every papist who shall not baptize his child by a lawful minister shall forfeit 100*l.* *ibid.*
- 18 By 3 Jac. 1. c. 5. every papist, not excommunicated, who shall bury other than in a church or churchyard, shall forfeit 20*l.* *ibid.*
- 19 By 3 Jac. 1. c. 5. magistrates may search the houses of papists for popish relics and deface them. 38
- 20 By 7 Jac. 1. c. 6. a feme covert papist who shall not conform within three months after conviction shall be committed unless her husband pay 40*l.* a month, &c. *ibid.*
- 21 In what cases the husband of a feme covert papist is not only liable to the forfeiture, but utterly disabled. *ibid.*
- 22 By 23 Eliz. c. 1. whoever shall perform *mass*, shall forfeit 200 marks, and

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- and whoever shall hear *mass* 100 marks, or suffer imprisonment. *Page* 39
- 23 By 11 & 12 Will. 3. c. 4. whoever shall apprehend a popish priest for saying *mass* shall receive 100*l.* and the priest shall suffer perpetual imprisonment. *ibid.*
- 24 But by 18 Geo. 3. this penalty is repealed, *provided* the priest has complied with the injunctions of *this* act. *ibid.*
- 25 By 30 Car. 2. c. 1. those who refuse to make a declaration against popery, are restrained from sitting in parliament, and from holding a place at court. 40
- 26 By 1 Will. & Mar. c. 9. those who refuse the declaration are restrained from living within ten miles of London, from keeping arms, and from presenting to a church. *ibid.*
- 27 By 1 Jac. 1. c. 4. whoever shall send another abroad for the purpose of receiving a popish education, shall be disabled in law and forfeit 100*l.* 41
- 28 By 3 Jac. 1. c. 5. whoever shall send a child abroad to prevent their good education in England, *without* licence, shall forfeit 100*l.* and such child shall be disabled to take, &c. 42
- 29 By 3 Car. 1. c. 2. to enter into any popish seminary abroad, or to cause another so to do, disables the offender in law, and incurs the forfeiture of his estates during life. *ibid.*
- 30 By 11 & 12 Will. 3. c. 4. a severe punishment is inflicted on professed papists unless by 18 Geo 3. c. 60. they have complied with the injunction of the last mentioned act. 44
- 31 By 3 Jac. 1. c. 5. and 1 W. & M. c. 26. professed papists are restrained from presenting to a church. 45
- 32 By 11 Geo. 3. c. 7. every grant by them of any ecclesiastical benefice is void unless made to a protestant purchaser. *ibid.*
- 33 Exposition made on the above statute, 3 Jac. 1. c. 5. 45, 46
- 34 By 11 & 12 Will. 3. c. 4. popish schoolmasters are to be perpetually imprisoned, except they conform to the 18 Geo. 3. c. 60. *Page* 46
- 35 By 11 & 12 Will. 3. c. 4. the chancellor may make such order as he thinks agreeable to the act upon any popish parent who shall compel a protestant child to change his religion, or who shall not allow such child a sufficient maintenance. *ibid.*
- 36 By 3 Jac. 1. c. 5. whoever shall import or buy popish books or relics shall forfeit 40*s.* *ibid.*
- 37 By 23 Eliz. c. 1. and 3 Jac. 1. c. 4. to become perverted, or to pervert others to the see of Rome is high treason. 67, 68
- 38 By 27 Eliz. c. 2. to become *ordained* by popish authority, is high treason. 68

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- 1 The judges will, in prudence, despite the execution of an infant in order to procure a pardon. 3*l.* 8
- 2 A king out of possession cannot grant a pardon. 57
- 3 In what case a forfeiture is not within a general pardon. 24*l.* 23
- 4 A pardon of felony discharges an indictment of high treason, if it want the word *proditoriè*. 99*l.* 1
- 5 The forfeiture of personalty for suicide, is saved by a pardon of the offence before inquisition found. 104
- 6 A defendant where homicide is found either *excusable*, or justifiable, shall be dismissed without a pardon. 105
- 7 What crimes cannot be pardoned without special words. 117
- 8 A pardon of felony extends not to piracy. 153
- 9 There can be no pardon of a recognizance of the peace before it is broken. 257
- 10 In what case the benefit of a general pardon cannot be waived. 292, 293

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PALACE.

- 1 In what cases contempts against the king's palaces, are punishable. *P. 87*
- 2 How far popish recusants are restrained from coming within the king's palaces. *35*

PARKS.

- 1 By 21 Edw. 1. c. 2. & 3 & 4 W. & M. c. 10. trespassers in parks, *resisting* the keepers, may be slain by the keepers with impunity. *107*
- 2 How far the power of a park-keeper will justify the trespass of a stranger, in homicide, on the grounds of a third person. *112*
- 3 By 9 Geo. 1. c. 22. to appear, armed and disguised, in any deer-park, &c. is felony without clergy. *187*
- 4 To hunt or wound any fallow deer in any inclosed deer-park, whether armed and disguised or not, is felony without clergy. *ibid.*
- 5 By 16 Geo. 1. c. 28. to enter any deer park, and hunt, kill, or wound any fallow deer, is transportation. *189*
- 6 By 5 Geo. 3. c. 30. to steal deer from any inclosed deer-park, or to aid therein, incurs different pecuniary penalties for the two first offences, and transportation for the third. *ibid.*
- 7 This statute *is said* to have virtually repealed the punishment inflicted by 9 Geo. 1. c. 22. *ibid. (N)*
- 8 The manner of apprehending and trying offenders upon this act. *189, 190*
- 9 Whoever armed with an offensive weapon, shall enter into any deer park, with intent to destroy the deer, and shall beat or wound the keeper, or his assistants, he shall be transported. *191*
- 10 By 6 Geo. 1. c. 16. whoever shall destroy the fences of parks, shall be committed for 3 months, &c. &c. *122*

- 11 By 16 Geo. 3. c. 30. whoever shall destroy the fences of deer parks, shall for the *second offence* be transported. *Page 122*

- 12 By 6 Geo. 3. c. 48. to destroy timber in the king's parks, forests, or chases, is transportation for the third offence. *216*

- 13 By 9 Geo. 3. c. 41. to destroy any underwoods, &c. in the king's parks, or forests, &c. is punishable by fine and imprisonment, &c. *217*

- 14 By 5 Geo. 3. c. 14. to enter into any inclosed parks, in or through which there is a river, stream, or pond, &c. and steal fish, or to aid in so doing, or to buy or receive such stolen fish, is transportation for seven years. *224*

Vide Murder. Hunters. Black Act. Deer.

PARLIAMENT.

- 1 By 25 Edw. 3. c. 2. the parliament only shall declare new treasons. *66*
- 2 To declare maliciously and by *writing*, that the crown of the kingdom cannot be limited by parliament, is *high treason*, and to affirm the same by *speaking*, is *premature*. *69*
- 3 By 30 Car. 2. c. 1. none shall vote in parliament without making the declaration, and taking the oaths. *40, 98*
- 4 In what cases petitions to parliament may be deemed libels. *354, 356*

PARRICIDE.

- 1 There is no extraordinary punishment by the law of *England*, for the crime of parricide.

PARSNIPS.

- 1 By 13 Geo. 3. c. 32. to steal parsnips growing, incurs a forfeiture of 10s. &c. &c. *207*

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PATENT.

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PATENT.—*Vide Monopoly.*

PATRON.—*Vide Papist.*

PEACE.—*Vide Behaviour.*

- 1 Of what description of persons, a justice of the peace, may *ex officio*, and at discretion demand surety of the peace. Page 253
- 2 It was the principal duty of a conservator to demand surety of the peace. *ibid.* (N) 1
- 3 Neither a secretary of state, nor privy councillor, are conservators of the peace. *ibid.*
- 4 All persons *whatsoever*, under the king's protection, may demand surety of the peace. *ibid.* f. 2
- 5 It has been questioned, whether Jews, pagans, or convicts in *præmunire*, have a right to it. f. 3
- 6 A wife may demand it against the outrageous threats of her husband; and a husband may demand it against his wife. f. 4
- 7 If the marriage be disputed, the court will frame the recognizance, so as not to admit the fact. *ibid.* (N) 2
- 8 A justice of peace ought to grant it, on demand, against any person, under the degree of nobility, of sane memory, whether a magistrate or private person, and whether of age or not. 254
- 9 Infants and *femes covert*, ought to find security by their friends. *ibid.*
- 10 The safest way against a peer, is by application to the chancery or king's bench. *ibid.*
- 11 *Quere*, If a joint recognizance may be taken for surety of the peace. *ibid.* (N) 2
- 12 For what causes surety of the peace is grantable. 254
- 13 By 21 Jac. 1. c. 8. all process for the peace or good behaviour, to be granted out of the chancery or king's bench, must be upon motion, in open court, upon the oath of the party requiring it, &c. &c. &c. P. 254, 255
- 14 In what cases, under what circumstances, and in what form the court of king's bench will grant surety of the peace. 255 (N) 4
- 15 In what manner surety of the peace is grantable by a justice of the peace. *ibid.* f. 9
- 16 Of the execution of the writ of *supplicavit*. f. 10
- 17 The warrant of a justice of the peace upon surety of the peace, can be executed only by those to whom it is directed, unless directed to the sheriff, &c. 256
- 18 In what case the officer may carry the party to gaol, without another warrant. f. 12
- 19 How the officer shall return the warrant if it be general, and how if it be special. f. 13
- 20 In what manner process upon surety of the peace may be supereded. f. 14
- 21 By 21 Jac. 1. c. 8. all writs of *superedeas* must be granted upon motion, in open court, and surety, &c. 257
- 22 What ought to be the form of the recognizance entered into upon filing articles of the peace. 257 f. 15, 16
- 23 A recognizance of the peace may be discharged by the demise of the king, or the party, if not previously forfeited. f. 17
- 24 But a release of the party at whose complaint it was taken, is only an *inducement* with the court, to discharge it. *ibid.*
- 25 The discontinuance of a recognizance is a ground for discharging it. 258
- 26 A recognizance cannot be pardoned or released, before it is broken. *ibid.*
- 27 The executors of sureties to a recognizance, continue bound for their testators. *ibid.*
- 28 A recognizance, by *supplicavit*, need not be certified without *certiorari* is brought. *ibid.* f. 18

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29 A recognizance of the peace, taken below, must be certified to the next session by force of 3 Hen. 7. c. 1.

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30 If the party then make default, the recognizance then shall be certified into the superior court. *ibid.*

31 But the sessions have a discretion, upon cause shewn, to excuse his default. *ibid.*

32 The sessions cannot proceed for the forfeiture.—But upon estreating the recognizance, the courts at *Westminster*, shall proceed to recover it by *scire facias*, and not by indictment. *ibid.*

33 *Quere* if the *scire facias* must shew the day on which the sessions were holden. *ibid.* (N)

34 A recognizance of the peace may be forfeited by any actual violence to any person whatsoever. *ibid.* f. 20

35 Or by any treason against the king; or unlawful assembly; or even by words tending to a breach of the peace. *ibid.*

36 But bare words of heat and choler, is not a cause of forfeiture. 259

37 There are also many actual assaults on the person of another which do not amount to a forfeiture of such recognizances. 259, f. 233

38 A variety of such assaults enumerated. *ibid.*

39 A servant is liable to such a forfeiture, for beating another in defence of his master's son—but not in defence of his master. 259, 260

40 Nor can a tenant beat another in defence of his landlord. 260

41 But a bare trespass, without violence, is not a cause of forfeiture. *ibid.* f. 25

42 Violence in any athletic sport, as cudgels, &c. is not a cause of forfeiture, but a wound given in playing with naked swords is. f. 26

43 A wound given by mischance or negligence, is no cause of forfeiture. f. 27

44 Such a recognizance shall not be forfeited except for some wilful breach of the peace. *ibid.*

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1 In what case it is felony to steal one. *Page 144*

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1 To receive a pension from a foreign prince without the king's permission, is highly criminal. 91

PER-

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- 1 The offence of granting them fraudulently. Page 565 c. 91
- 2 By 6 Geo. 1. c. 21. all dealers in spirits, &c. shall make an entry of their stocks and places of sale. f. 1
- 3 No stock shall be brought in before notice is given to the officer, and a certificate of the duty being paid, or that it has been condemned, or of the person's stock from whence it is brought. 566
- 4 None to be sold but in such entered places. f. 3
- 5 Officers to give sellers a certificate to the buyer, expressing the quantity, names, &c. &c. f. 4
- 6 No quantity above one gallon to be removed without a *permit*. f. 5
- 7 Whosoever shall have above 60 gallons, shall be deemed a dealer. f. 6
- 8 By 11 Geo. 1. c. 30. Such spirits shall be removed within the time limited in the permit, which shall be returned to the officer, and if the stock of the person removing such spirits shall not appear to be proportionately decreased, he shall forfeit the quantity to be removed. f. 7
- 9 No person shall receive such permit without direction in writing from the person removing, or his known servant. 567
- 10 By 23 Geo. 3. c. 70. the manner and form of granting *permits*, upon request notes are directed, &c. f. 9
- 11 The commissioners shall provide paper for *permits* with the words *excise-office* visible thereon—and plates, &c. for printing the same. f. 10
- 12 And whoever, unauthorized, shall make, &c. or assist in making, &c. any frame or instrument for making such paper,—or shall make or assist in making such paper,—or shall make or assist in making any plate, &c. for printing such paper to be used for permits, shall be guilty of *felony without clergy*. 567, 568
- 13 And whoever shall forge, or counterfeit any permit, or give, accept,

or receive any false or untrue permit, or alter, or erase any true permit,—or make use of the same, shall forfeit 500 L. Page f. 12

- 14 And if any officer of excise, or other inland duties, shall deliver out any such paper as aforesaid, with the words *excise office* visible, &c.—or if any such officer shall grant an untrue permit, or make an untrue entry thereof, &c. he shall be transported for seven years. f. 12

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1. Is the taking absolutely, a wilful false oath, required in any judicial proceeding, and material to the point in question, whether it is believed or not. 318 c. 69
- 2 It must be deliberately taken, and not the effect of surprise, inadvertency, or mistake. 319 f. 2
- 3 It must be taken before those who are empowered to administer justice; and who have a competent jurisdiction of the subject matter. *ibid.* f. 3
- 4 As before persons authorized by the king to examine witnesses; or in a court of record upon issue therein; or before any court of equity, spiritual, or other lawful court whether of record or not; or before persons authorized by such courts, as the sheriff upon a writ of enquiry. 319, 320
- 5 So it is perjury, to swear to a greater substance than a man possesses, in justifying bail; it may be committed, in swearing the peace against another before a justice; or respecting forfeitures, or defective titles to land before commissioners. 320
- 6 But no oath of a mere private nature can be the subject of perjury. *ibid.*
- 7 Neither can any promissory oaths; and therefore official oaths, for the true performance of duty cannot be punished as perjuries, but such an offender is liable to a severe fine. 321
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- 8 No person can be indicted for perjury in a false oath, administered by a person who has not competent and lawful authority in the subject matter, on which the oath is taken. *Page 321 f. 4*
- 9 Therefore *quere* if even a magistrate is justifiable in administering a voluntary oath upon an extrajudicial matter. *ibid. (N) 1*
- 10 No oath administered by persons under an assumed authority from courts of justice can be the subject of perjury. *321*
- 11 But perjury may be committed in oaths administered under the authority of a commission, after it is determined by the demise of the crown. *322*
- 12 And *qu.* if perjury may not be committed in proceedings which are afterwards reversed for error. *ibid.*
- 13 Perjury may be assigned on an oath stated to have been taken before one of the judges of assize, although the caption recites the commission in which both are named, and the record of *Nisi prius* prove it to have been taken, as the form is, before them both. *ibid. (N) 2*
- 14 In what oaths perjury may be committed. *ibid. f. 5*
- 15 It is not material whether the fact sworn be true or false. *f. 6*
- 16 It is said the oath must be absolute (but this has been determined otherwise, and a man who swears that "he believes" any thing to be true, which he knows to be false, is guilty of perjury. *f. 7*
- 17 The oath must be material to the matter in question. *f. 8*
- 18 But, *quere*, if it be not directly material, yet so circumstantial as to bias the opinion of the jury, whether it should not be punished as perjury. *324*
- 19 A defendant in swearing to an answer in equity, may be guilty of perjury although the fact to which he swears is not required to be answered by the bill. *325*
- 20 So perjury may be committed in an oath tending to extenuate or aggravate the damages, as well as in an oath which is direct to the issue. *ibid.*
- 21 The degree of materiality is not necessary to be proved, nor is it necessary for the evidence to be such as will intitle the party to recover; but it is incumbent on the prosecutor to prove the materiality. *Page 325(N) 3*
- 22 It is not necessary that the oath should be believed, or that the party should be injured by it. *ibid. f. 9*
- 23 But on a prosecution for the perjury it will be credited until it is disproved by two witnesses, for which purpose, the party complaining of the perjury, is not an admissible witness. *ibid. (N) 4*
- 24 OF PERJURY BY STATUTE. *326 f. 11*
- 25 By 8 Eliz. c. 9. whoever shall be convicted of perjury, upon that statute, shall forfeit 20*l.* suffer six months imprisonment, be rendered incapable of being a witness until the judgment be reversed; and then he shall be liable in damages to the party grieved. *327 f. 13*
- 26 If he shall not have property to the value of 20*l.* he shall have both his ears nailed to the pillory. *ibid. f. 14*
- 27 One moiety of the forfeiture to the king; the other to the party grieved. *ibid.*
- 28 The quarter sessions may enquire of perjury on this statute. *ibid.*
- 29 But the justices have no jurisdiction over this offence at common law; and indictments are usually preferred at the assizes. *ibid. (N) 15*
- 30 The statute not to extend to spiritual courts. *ibid. f. 5*
- 31 Nor shall the statute restrain the common law punishment; so as the judges do not inflict less than the act prescribes. *328*
- 32 Therefore the king's bench may inflict fine and pillory, without inquiring of the lands. *ibid.*
- 33 By 2 Geo. 2. c. 25. judges may, over and above the said punishments, order the offender to be sent to the house of correction, or transported for any term not exceeding 7 years. *ibid.*
- 34 In a prosecution on 5 Eliz. the words of the statute must be exactly pursued. *f. 17*

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- 35 It must also expressly alledge that the defendant was sworn. *Page* 329
- 36 But it need not state, that the perjury was committed by means of subornation, &c. 329
- 37 But no one can be guilty of perjury upon this act who may not, possibly, be guilty of the subornation. *f.* 19
- 38 No indictment, or criminal information, lies upon this statute. *ibid.*
- 39 The statute extends to no other perjury than that committed by a witness. 330 *f.* 20
- 40 And a false affidavit against another in a court of justice is not within the act. *f.* 21
- 41 And *qu.* if a false oath upon a writ of enquiry is within it. 331
- 42 But if the defendant should *in the face of the court*, confess an affidavit to be false, the common pleas has punished the offender under this act. *ibid.* (N)
- 43 The oath must be to the prejudice of another. *ibid.* *f.* 22
- 44 And the party who complains must have been actually grieved by it, and be so proved. 332
- 45 And *the manner* in which the false oath conduced to the prejudice must be set forth. *ibid.*
- 46 By a positive *overtment*, and not by way of *innuendo*. *ibid.*
- 47 Therefore where the party is *benefited* by the perjury, the offender cannot be prosecuted on this statute. *ibid.*
- 48 So also it must appear to have been committed in a cause properly depending between the plaintiff and the party for whom the offender was examined as a witness. 333
- 49 By 8 Geo. 1. c. 6. perjury may be assigned upon the quakers affirmation. *f.* 24
- 50 By 31 Geo. 3. c. 10. perjury to obtain the probate to a seaman's will, or letter of administration to his effects, is DEATH WITHOUT CLERGY. 334
- 51 By 28 Geo. 2. c. 13. perjury, in sheriffs or officers, upon any of the matters of the act incurs 500*l.*—and if committed by a prisoner, intending to take advantage of the act, is death without clergy. 334 (N) 6
- 52 How perjury shall be charged and assigned by 23 Geo. 2. c. 11. *Page* 334 *f.* 26, 27
- 53 How the court will treat an indictment seemingly defective. *ibid.* (N) 8
- 54 The court may order perjured witnesses to be prosecuted, &c. 335 *f.* 28
- 55 By 12 Geo. 1. c. 29. attorneys who shall practise after having been convicted of perjury, shall be transported for seven years. *f.* 29

PERSONATING.

- 1 By 4 & 5 W. & M. c. 4. whoever shall personate another before commissioners authorised to take bail, & as the personated *may* become liable, shall be guilty of felony. 179
- 2 By 8 Geo. 1. c. 22. 9 Geo. 1. c. 12. 31 Geo. 2. c. 22. and 4 Geo. 3. c. 25. whoever shall personate a proprietor of any of the public stocks or funds, thereby endeavouring to receive any dividend, or annuity, of such proprietor, as if he were the true proprietor, or who shall assist or aid therein, shall suffer death without benefit of clergy. 207, 208, 212, 213
- 3 Upon these statutes it was resolved *in Parr's case*, O. B. February sessions, 1787, (*since the body of the work was printed*) that the single act of obtaining a dividend warrant, in the name of a proprietor, without accompanying the act with any attempt to receive the money on the warrant on it, although several hours intervened between the time of obtaining the warrant and the apprehending of the offender, is "endeavoring to receive," &c. within the words of the act.
- 4 By 31 Geo. 2. c. 10. whoever shall personate the name or character of any seaman, or other person intitled to wages, or other monies for services on board any of the king's ships, or the executor, administrator, wife, relation, or creditor of such person, in order to receive the monies so due to him, shall suffer death without clergy.

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- 1 Endeavouring to frighten the king into a change of measures, by tumultuous petitioning, is a high contempt against his person and government. *Page 92 f. 3*
- 2 By 13 Car. 2. c. 5. no address to the king or parliament, for alteration of any matter of church or state, shall be signed by more than twenty persons, unless first consented to by three justices, grand jury, or lord mayor, &c. on pain of 100*l.* 309
- 3 By 1 W. & M. c. 2. it is declared to be the right of the subjects to petition the king, and that all prosecutions for so doing are illegal. 310
- 4 But this act does not repeal 13 Car. 2. c. 5. *ibid.*
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- 1 What was considered petit treason at common law. 131
- 2 It is confined by 25 Edw. 3. to a servant who kills his master, or a wife her husband, or a priest his patron. *ibid.*
- 3 A son who kills his father is not within the act, unless he is a servant to him. *ibid. f. 2*
- 4 The murder of a mistress is petit treason. 132
- 5 If a servant has left his master at the time of the murder, yet it is treason if the malice were hatched during the service. *ibid. f. 4*
- 6 Aiders and abettors are within the act. *ibid. f. 5*
- 7 But if the fact do not amount to murder, it cannot be petit treason. f. 6
- 8 And if a stranger murder at the instigation of the servant, &c. in the absence of the servant, it cannot be petit treason. *ibid.*
- 9 But otherwise, if even constructively present. 133

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- 10 A wife *de facto* only is not within the act. *Pa. 133 (N) 2*
- 11 A canonical obedience results from ordination, &c. *ibid. f. 7*
- 12 Petty treason and murder are of the same nature. *ibid. (N) 3*
- 13 The judgment for this crime. *ibid.*
- 14 Both principal and accessaries are debarred of clergy. 133, f. 8

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- 1 All persons at liberty to exercise their endeavours to make it. 73 f. 12

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- 2 How it was punishable at common law. *ibid. f. 2*
- 3 It may now be tried by the king's commission, after the course of the common law. *ibid. f. 3*
- 4 Ouled of clergy by 28 Hen. 8. c. 15. 153
- 5 The offence must be alledged to be done at sea. f. 6

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- 10 An attainder of piracy does not corrupt the blood. *f. 8*
- 11 Unless the indictment be as for a robbery at common law. *ibid. (N) 2*
- 12 How an offender standing mute shall be punished. *ibid. f. 9*
- 13 No piracy unless the offence would have been felony if done on land, and the indictment must be both *felonice et piratice*. *f. 10*
- 14 The statute extends not to creeks, &c. within the body of a county. *ib.*
- 15 By 11 & 12 Will. 3. c. 7. the trial of pirates may be either at sea or upon land at any places abroad. *155*
- 16 To commit hostility at sea under colour of a foreign commission is piracy. *ibid. f. 13*
- 17 Captains or seamen betraying their trust, running away with the ship, &c. yielding it up, or confederating with pirates, &c. deemed piracy. *f. 14*
- 18 Accessaries in piracy described and ousted of clergy. *156*
- 19 And shall be tried as principals are directed to be by 28 Hen. 8. *ibid. f. 16*
- 20 To trade with pirates, or to fit out ships for that purpose, &c. deemed piracy. *157*
- 21 To board a merchant ship and throw the cargo overboard, deemed piracy. *ibid. f. 18*
- 22 Ships fitted out to correspond with pirates, are forfeited. *ibid. f. 19*
- 23 All persons made accessaries by 11 & 12 Will. 3. deemed principals and excluded from clergy. *f. 20*
- 24 Seamen, maimed by pirates, intitled to admission to Greenwich Hospital, but if they neglect to defend themselves, they shall be imprisoned six months and forfeit their wages. *ibid.*
- 25 Pirates tried for the felony shall not be afterwards tried for the high treason. *158*
- 26 To ransom a neutral ship or to set her free before she is brought into port, deemed piracy. *Page 158 f. 22*
- 27 A session of admiralty shall be holden twice a year at the Old Bailey or at such other place as three commissioners shall direct. *159*
- 28 Commissioners, justices, sheriffs, &c. impowered to act with respect to piracy. *ibid. f. 24*

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- 1 By 9 Geo. 1. c. 22, to destroy trees planted in any avenue or growing in any garden, orchard, or plantation, &c. is felony without clergy. *215*

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- 1 By 6 Geo. 3. c. 36. to destroy *in the night time*, any root, shrub, or plant, of the value of 5*s.* in any inclosed ground, or to aid, &c. is transportation seven years. *215*
- 2 By 6 Geo. 3. c. 48. to destroy any plant, &c. in any cultivated lands is 40*s.* for the first offence, 5*l.* for the second, and transportation for the third. *216*

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- 1 By 1 Car. 1. c. 1. there shall be no interludes or common plays used by any persons in their own parishes on the lord's day. *11*
- 2 By 3 Jac. 1. c. 21. whoever shall use the name of the Trinity in any play *play*

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- play or interlude, profanely or jestingly, shall forfeit 10*l*. *Page* 13
- 3 A playhouse may become a common nuisance, if it draw together such numbers as become inconvenient. 362
- 4 By 10 Geo. 2. c. 28. actors of plays in unlicensed houses are deemed rogues and vagabonds, &c. and are liable to a penalty of 50*l*. 560
- 5 A true copy of all dramatic works shall be sent to the lord chamberlain, fourteen days before representation signed by the manager, &c. on pain of 50*l*. 561
- 6 The lord chamberlain may prohibit the representation. *ibid.*
- 7 Plays acted in public houses shall be deemed to be acted for hire, &c. and liable to the above penalties. *ibid.*
- 8 The manner of recovering the penalty. *ibid.*
- 9 By 17 Geo. 2. c. 5. all common players, deemed rogues and vagabonds. 570

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- 1 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. if any officer, servant, post-boy, or rider, employed by the post-office, shall secrete or destroy any letter, packet, or bag of letters, which he may be intrusted with, containing any security for money, or shall steal such security out of any letter, he shall suffer death without clergy. 140
- 2 If the indictment charge the offender as acting in one department of the office, and the verdict find him guilty as a servant in another department, not connected with that charged in the indictment, it is good in arrest of judgment. *ibid.* (N) 4
- 3 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. whoever shall rob any mail in which letters are sent by the post-office of any letter, packet, or bag, or shall steal any letter, bag, or packet, from any such mail, or from the post-office, or from any of the receiving houses, shall suffer death without clergy. 143

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- 2 To buy or sell any doubtful or disputed titles to lands, to the intent that the buyer may carry on the suit, 8

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- is a high offence at common law. *Page 553 f. 1*
- 3 It is immaterial whether the title be good or bad, or whether the party were in possession or not. *ibid.*
- 4 By 1 Rich. 2. c. 9. no defendant shall alienate lands in suit, &c. and the disseisee of such lands shall recover against the original disseisor, if he commence his suit within a year and a day. *554*
- 5 Feoffments of this kind are only void in respect of the disseisees. *f. 3*
- 6 By 13 Ed. 1. c. 49. none of the king's house shall buy any title while the thing is in dispute. *ibid.*
- 7 By 32 Hen. 8. c. 9. all sales of pretended titles to lands, &c. where the party or his ancestors have been in possession of the same, or of the remainder or reversion, or taken the rents one whole year before such sale, shall be void, and the land forfeited, if sued for within a year. *f. 4*
- 8 But a person in possession of lands, &c. may buy pretended titles, &c. *555*
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- 10 The plaintiff need not recite this statute in an action on it. *f. 8*
- 11 In an action against *the buyer*, it must appear that *he* did know that the seller had not been in possession, &c. for a year. *f. 9*
- 12 It must be averred that *the seller* had a pretended title. *f. 10*
- 13 The value of the land at the time of the bargain must be set forth. *f. 11*
- 14 A contract for a customary estate; or for a lease for years is within the statute. *566*
- 15 And it is not necessary to state the commencement or the end of such lease. *f. 13*
- 16 Even a lease *by reputation*, though void in law, is within this act. *f. 14*
- 17 A disseisor obtaining a release from a disseisee; or a mortgagor redeeming his land, are not within the statute. *f. 15*
- 18 One who gains possession of land by judgment of law, in affirmance of an ancient title, is not within the act in respect of any lease made of such lands. *Page 366 f. 16*
- 19 But otherwise if the title is still contested, and the lease was made for the purpose of maintenance. *ibid.*
- 20 If a disseisee enter upon a disseisor in possession under a pretended title and immediately sell to a stranger, it is within the statute. *557*
- 21 But such a sale by a father to a son is not. *ibid.*
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- 4 By 13 Eliz. c. 2. whoever shall purchase any *bull* from Rome, is guilty of high treason. *79*
- 5 It is in the option of the crown to proceed on the ancient statutes for the *præmunire*, or on the 13 Eliz. for the treason. *ibid. f. 13*
- 6 By 13 Eliz. c. 2. the aiders of such offenders after the offence incur a *præmunire*. *ibid.*
- 7 By 27 Edw. 3. c. 1.—38 Edw. 3. c. and 16 Rich. 2. c. 5. it is made *præmunire* to derogate from the king's common law courts. *79*
- 8 The several contrivances which have been made on the above statutes. *80*
- 9 By 24 Hen. 8. c. 12. 20, 21. & 25 Hen. 8. c. 19. to appeal to *Rome*, from any of the king's courts is *præmunire*. *ibid.*
- 10 By 26 Hen. 8. c. 14. exercising the jurisdiction of a *suffragan* without leave of the bishop is *præmunire*. *ibid.*

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- 21 By 25 Hen. 8. c. 20. refusing to consecrate a bishop is *præmunire*.
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- 22 By 5 Eliz. c. 1. maintaining the pope's power, is made a *præmunire* upon the first conviction, and high treason on the second. 81
- 23 By 13 Eliz. c. 2. it is made *præmunire* to bring in any *agnus dei*, crosses, or such superstitious reliques. *ibid.*
- 24 Whoever shall receive such reliques to wear, without discovering the offender, shall incur *præmunire*. *ibid.*
- 25 A justice shall incur the like offence, who, on information, does not discover the offender to a privy councillor in 14 days. *ibid.*
- 26 By 1 Eliz. c. 1. 5 Eliz. c. 1. 3 Jac. 1. c. 4. 7 Jac. 1. c. 6. 1 W. & M. c. 8. and 7 Will. 3. c. 14. refusing to take the oaths of allegiance, supremacy, &c. incurs the pains of *præmunire*. 81, 84
- 27 Several adjudications on the two first of the above recited statutes. 82
- 28 By 6 Ann. c. 7. to affirm that the pretender has any right to the crown, or that the parliament cannot limit the succession of it, is *præmunire*. 84
- 29 By 1 & 2 P. & M. c. 7. to molest the possessors of the abbey lands granted by Henry 8 is *præmunire*. 85 (N)
- 30 By 21 Jac. 1. c. 3. to procure any action to be irregularly delayed, is *præmunire*. *ibid.*
- 31 By 16 Car. 1. c. 21. and 1 Jac. 1. c. 8. to pretend authority to obstruct the importation of gunpowder, &c. is *præmunire*. *ibid.*
- 32 By 12 Car. 2. c. 24. to be guilty of purveyance incurs *præmunire*. *ibid.*
- 33 By 13 Car. 2. c. 1. to assert that either house of parliament has legislative authority without the king is *præmunire*. *ibid.*
- 34 By 31 Car. 2. c. to transport a subject contrary to the *habeas corpus* act, is *præmunire*. 87
- 35 By 20 Car. 2. 7. conspiracies to avoid the seizure of cattle in certain cases is *præmunire*. *ibid.*
- 36 By 6 Ann. c. 23. to treat other than of the election when assembled at *Holyrood House*, is *præmunire*. P. 87
- 37 By 6 Geo. 1. c. 18. to open *bubbles* similar to the South-sea project, is *præmunire*. *ibid.*
- 38 By 12 Geo. 3. c. 11. whoever shall solemnize, or assist in, or be present at the marriage of any of the descendants of Geo. 2. other than such issue as shall spring from connection with foreign families, without the previous consent of the king specified in the licence, registered in the privy council, shall incur the pains of *præmunire*. 86
- 39 In what manner the offence of *præmunire* shall be punished. 84, 85
- PRIEST.**—*Vide Papist. Church. Treason.*
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- 1 How far within the statute of treasons. 53, 54
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cillor, is said to be high treason.

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- 2 By 3 Hen. 7. c. 14. conspiracy by the king's subordinate servants, to murder a privy councillor is felony.

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- 3 By 9 Ann. c. 16. to attempt to kill, or wound, a privy councillor in his duty, is felony without clergy.

ibid.

- 4 Homicide beyond sea, being examined by the privy council, may be tried in any county by commission.

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- 5 A privy councillor is in danger of *præmunire* by stopping an action against a monopolist.

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PRIVATELY STEALING.

- 1 By 8 Eliz. c. 4. whoever shall steal from the person of another, any goods privily without his knowledge shall not be admitted to clergy.

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- 1 In what cases recusants may be convicted by proclamation.

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- 1 In what cases prohibition will lie for heresy.

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- 2 It does not lie in any proceeding on the spiritual law, unless something be attempted in derogation of the common law.

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PROTESTANT DISSENTERS.

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PROTESTANT SUCCESSION.

- 1 By 4 Ann. c. 8. and 6 Ann. c. 7. to maintain by writing, that the pretender has any right to the crown, or that parliament cannot bind and limit the succession thereof, is high treason, and to affirm the same by advised speaking, is *præmunire*.

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- 2 By 1 Ann. c. 7. advisedly to hinder the accession of any one who is next in succession to the throne, according to the 1 W. & M. and 12 Will. 3. is high treason.

ibid.

- 3 By 13 Will. 3. c. 3. the pretender is attainted of high treason.

ibid.

- 4 By 17 Geo. 2. c. 39. to hold correspondence with him or his sons, is high treason.

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PROVISIONS.—*Vide Papists. Victuals.*

PROSECUTION.—*Vide Conspiracy.*

PROVOCATION.—*Vide Murder. Manslaughter.*

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PUBLIC HOUSES.

- 1 Publicans may be indicted for encouraging disorders; and for refusing to entertain guests. (*Vide Innkeeper.*)

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- 2 By 12 Ed. 2. c. 6. no person concerned in the *affize* of wine or victuals, shall be either a publican or victualler.

452, 453

- 3 By 3 Hen. 8. c. 8. directions are given how the *affize* of wine and victuals shall be set.

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- 4 By 21 Jac. 1. c. 21. publicans and innholders are directed to dispose of

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- their commodities, and *horse bread*, at reasonable prices. Page 453, 454
- 5 By 5 & 6 Ed. 6. c. 25. two justices, one of the *quorum*, shall have power to remove, discharge, and suppress common alehouses. 454 f. 9
- 6 A publican suppressed upon this act, cannot be licensed again, except in open sessions. f. 10
- 7 By 5 & 6 Ed. 6. c. 25. and 26 Geo. 2. c. 31. no public houses shall be kept, except in fairs, but by such as shall be allowed in open sessions by two justices, 1 2. f. 11
- 8 This exception extends only to the place where the fair is actually held; not to any house adjoining to it. *ibid.* (N) 1
- 9 And beer brewed in fairs must pay the excise duty. *ibid.*
- 10 By 2 Geo. 2. c. 28. the reasons are given for the present mode of licensing public houses. 455
- 11 Lodging and boarding houses, however public, do not require licence. (N) 1
- 12 By 26 Geo. 2. c. 31. yearly licences shall be granted in counties from the 1st. to commence 29th of Sept. by two justices *of the assize*, at such place, as they, by public notice, shall previously direct. 455
- 13 Every licensed publican shall be bound in a recognizance of 10*l.* to preserve proper œconomy and good order. f. 13
- 14 The uncontroled power of justices in granting licences, and the instances of misconduct for which alone the king's bench will examine their proceedings. 456 (N) 4
- 15 By 5 & 6 Ed. 6. c. 25. the quarter session, by *presentment or information*, shall enquire into recognizances forfeited, and award process accordingly. f. 14
- 16 The justices may order a public-house to be suppressed. *ibid.* (N) 5
- 17 By 26 Geo. 2. c. 31. justices may take away licences unless cause can be shewn, that the condition of the recognizance has been fulfilled. f. 15
- 18 If the justice convicts without summoning the party, he is liable to an information. *ibid.* (N) 5
- 19 But the justices cannot suppress a licensed public house, except for disorders amounting to a nuisance, or for a breach of the recognizance. Page 457 (N) 7
- 20 A conviction for a breach of the recognizance disables the offender to sell either malt or spirituous liquors for 3 years, and renders his licence void. 457
- 21 By 5 & 6 Ed. 6. c. 25. any two justices may commit an unlicensed publican, until he binds himself not to sell liquors without licence, &c. 457, 458
- 22 By 26 Geo. 2. c. 31. the excise-man's book shall be good evidence to prove a man to be an alehouse-keeper. 458
- 23 Justices may summon and examine persons whom they shall suspect to be unlicensed; and suppress the house. 458, 459
- 24 The recognizances taken by the justices, on licensing public houses, shall be transmitted to the sessions. 459
- 25 The clerks of the peace shall give an account of the recognizances to the justices, at their yearly meetings. *ibid.*
- 26 By 26 Geo. 2. c. 31. no licence shall be granted to any person not licensed the preceding year, unless such person produce a certificate from his parish, of the propriety of his character. 460
- 27 This certificate not necessary in licensing houses in cities and towns corporate. *ibid.*
- 28 If a publican die or remove, his licence shall continue till the next licensing day. 460, 461
- 29 By 26 Geo. 2. c. 13. no justice concerned in the sale of liquors, shall be concerned in granting licences. 461
- 30 By 4 Jac. 1. c. 4. to deliver ale and beer for sale, to an unlicensed person, incurs a forfeiture of 6*s.* 8*d.* a barrel. *ibid.* f. 26
- 31 By 2 Geo. 2. c. 28. retailers of *distilled liquors* shall be licensed in the same manner as common publicans. f. 27
- 32 By 10 Geo. 2. c. 17. retailers of *made wines*, who are publicans, shall be licensed by two justices. f. 28
- 33 By

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- 33 By 16 Geo. 2. c. 8. sellers of *strong waters* shall be first licensed by the commissioners of excise. Page 469 f. 29
- 34 But no person shall be thus licensed, unless previously licensed by two justices. 461, 462
- 35 By 2 Geo. 2. c. 28. justices of peace shall have the same jurisdiction over retailers of spirituous liquors as they have over common publicans. 462(N)
- 36 By 17 Geo. 2. c. 17. whoever shall mix liquors for sale at home, or send quantities of less than two gallons abroad, deemed retailers. 462 f. 30
- 37 By 11 Geo. 2. c. 26. clandestine sellers deemed retailers. *ibid.* (N)
- 38 By 9 Geo. 2. c. 23. giving liquors to servants or apprentices, &c. deemed retailing. *ibid.*
- 39 By 24 Geo. 2. c. 40. no licence, in London, shall be granted but to occupiers of 10*l.* a year, &c. nor in other places, but to those who pay to *church and poor*. f. 31
- 40 By 9 Geo. 3. c. 6. liquors found in the house of an unlicensed person may be seized. f. 32
- 41 By 24 Geo. 2. c. 40. Officers, by warrant may break open doors, &c. 463
- 42 By 13 Geo. 3. c. 56. the penalty of retailing distilled liquors without a licence, is increased from 10*l.* to 50*l.* f. 34
- 43 By 26 Geo. 2. c. 31. the *representatives* of a publican may use the unexpired term of his licence without producing the certificate required by No. 26. f. 35
- 44 In case any licensed house becomes empty after the licensing day, two justices at a petty sessions, may grant a licence till the general licensing day, upon the production of certificate required, No. 26. 464
- 45 Retailers of liquors in prisons shall be deemed common publicans. *ibid.*
- 46 The commissioners of the excise shall not license any person to sell spirituous liquors, who is not previously licensed to sell ale and beer by two justices. *ibid.*
- 47 By 5 Geo. 3. c. 46. every person convicted of selling ale and beer, or other exciseable liquors by retail without licence shall forfeit 40*s.* and costs for the first offence 4*l.* for the second, 6*l.* for the third, &c. Page 464, 465
- 48 The manner in which the justices may hear and determine the offence. 465
- 49 The penalty on witnesses not obeying the summons. *ibid.*
- 50 How persons aggrieved may appeal. 466
- 51 By 21 Jac. 1. c. 7. &c. publicans shall forfeit 10*s.* for encouraging or permitting tippling in their houses. *ibid.*
- 52 How the penalty for so doing is to be levied. 467
- 53 How this offence shall be punished in the universities. *ibid.*
- 54 By 4 Jac. 1. and 21 Jac. 1. c. 7. drunkards are punishable with a forfeiture of 5*s.* or, on default of payment, with six hours confinement in the stocks. 467, 468
- 55 Repeated or continued tippling incurs a forfeiture of 3*s.* 4*d.* or confinement four hours in the stocks. 468
- 56 All officers shall be charged to present such offence—but one punishment only shall be inflicted. *ibid.*
- 57 The jurisdictions of the ecclesiastical court and of the two universities, is saved. 469
- 58 By 7 Jac. 1. c. 10. if any publican be convicted, on 1 Jac. 1. c. 9. or 4 Jac. 1. c. 5. he shall, in addition to the above penalties, be disabled to keep a publick house for three years. *ibid.*
- 59 By 30 Geo. 2. c. 24. if any licensed publican shall suffer labourers, servants, &c. to game in his house, he shall forfeit 40*s.* for the first offence, and 10*l.* for every subsequent offence. *ibid.*
- 60 And the parties who so game shall be liable to pay a penalty from 5*s.* to 20*s.* or be committed to hard labour. *ibid.*

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PUBLIC WORSHIP.—*Vide Church.*

PURLIEU.—*Vide Chanc. Forest. Park. Deer, &c.*

PURVEYORS.

- 1 The history of purveyance and pre-emption. *Page 181*
- 2 The principle of it denied by magna charta. *ibid.*
- 3 Abolished by 12 Car. 2. c. 24. *ibid.*

Q.

QUARE IMPEDIT.

- 1 **I**N a *quare impedit*, if the bishop plead *heresy*, he must shew the particular point. *6, 7*

QUARRELS.—*Vide Affrays.*

QUARANTINE.

- 1 By 26 Geo. 2. c. 26. all vessels, persons, and goods, coming from a place suspected by the privy council to be infected shall perform *quarantine*, in such manner as the king shall direct, &c. *241*
- 2 If the plague shall appear on board any ship, being to the Northward of *Cape Finisterre*, the commander shall proceed to *St. Helen's pool*, &c. untill the king's pleasure be known, on pain of death without clergy. *ibid.*
- 3 The king's ships may force any vessel obliged to perform *quarantine*, to repair to the place appointed—and if any commander shall conceal having the plague on board, he shall suffer death, without clergy. *242*
- 4 Penalties for not making a true discovery of the other particulars directed by the act. *ibid.*

5 Whoever, being ordered to perform *quarantine*, shall refuse to repair to the *lazarets*, or shall escape or attempt to escape therefrom, &c. shall suffer death, without clergy. *Page 242*

6 And any person not infected, nor liable to perform *quarantine*, who shall enter into any *lazarus*, or other place for performing *quarantine*, and shall attempt to return, or to make his escape therefrom, before the time is expired, he shall suffer death without clergy. *ibid.*

7 Officers neglecting their duty, forfeit 100*l.* &c. &c. *ibid.*

8 Whoever shall clandestinely convey any goods or letters, &c. from any ship or *lazarus*, performing *quarantine*, shall suffer death without clergy. *ibid.*

QUEEN.

- 1 A queen regnant, is within the meaning of the words, "our lord the king," in the statute of treasons. *53 f. 20*
- 2 A queen dowager is not within the statute. *f. 22*
- 3 A queen divorced *a vinculo matrimonii* is not within the statute. *53 (N) 2*

R.

RAPE.

- 1 **I**S the carnal knowledge of a woman by force. *169*
- 2 Nothing less than actual penetration and emission can amount to a rape; but emission is *prima facie* evidence of penetration. *ibid. f. 1*
- 3 It is no excuse that the woman at last yielded, or consented after the fact; or was a common strumpet; or conceived from the fact. *170 f. 2*
- 4 But if she make no complaint *at the time*, it is a strong ground for presuming consent. *ibid. f. 3*
- 5 By 18 Eliz. c. 7. whoever shall carnally know a woman child under ten years

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- years of age, shall suffer as a felon without clergy. *Page 170 f. 4.*
- 6 Whether with or without consent in this case, is not material; but penetration must be proved. *ibid. f. 5*
- 7 All aiders and assisters, *present*, whether male or female, are principals. *f. 6*
- 8 How this offence was formerly punished. *f. 7*
- 9 By 8 Eliz. c. 7. this offence is excluded from the benefit of clergy. *ibid.*
- REALM.—*Vide Contempts*, No. 37, 38.
- REASON.—*Vide Madmen.*
- REBELS.—*Vide Treason.*
- 1 Private persons may arm and assemble to oppose and suppress rebels. 267, 268, 298
- RECOGNIZANCES.—*Vide Public Houses. Behaviour. Peace.*
- RECORD.
- 1 The embezzling, defacing, or altering any record, is a high offence at common law, punishable with fine and imprisonment. *177*
- 2 By 8 Hen. 6. c. 12. if any record or proceeding in the king's courts, be stolen, whereby any judgment shall be reversed, the offenders, their aiders, &c. shall be guilty of felony. *ibid.*
- 3 The jury shall be equally impanelled from officers of any two of the courts in Westminster Hall, to try the indictment. *ibid.*
- 4 The offence shall be tried either by the king's bench, or by the common pleas. *ibid.*
- 5 The above acts only extends to the exchequer, king's bench, and common pleas; and the chancery as far only as it proceeds according to the common law. *ibid.*
- 6 The judges are not within the act. *ib.*
- 7 But by 8 Rich. 2. c. 4. judges as well as clerks shall pay a fine for raising rolls, &c. *Page 177*
- 8 Judges are punishable at common law for falsifying records. *ibid.*
- 9 Whether it is necessary that the alteration of the record should occasion a reversal of the judgment. *178*
- 10 If the offence be not completed in one county, the offender cannot be indicted for the felony, but for the misprision only. *ibid.*
- 11 Accessories after are left to the general construction of the law. *ibid.*
- 12 If the offence be committed in a different county from that in which either of the courts sit, the court who tries must have a special commission. *ibid.*
- 13 If committed in London the lord mayor shall not be included in the commission. *ibid.*
- 14 By 21 Jac. 1. c. 26. it is felony without clergy, to acknowledge a record, &c. &c. in the name of another. *178 f. 9*
- 15 The trial shall be in the county where the personating is committed. *178, 179*
- 16 In personating bail, if the bail piece be not filed, it is no felony, but misdemeanor only. *179*
- 17 By 4 & 5 W. & M. c. 4. to personate another before commissioners authorized to take bail, is felony. *ibid.*
- 18 In what case a record may be avoided by an averment of usury. *532 f. 20*
- 19 *Nul tiel record* a good plea to maintenance. *544*
- 20 In what cases the record of justices, for a riot may be traversed. *299, 302*
- 21 A record of forcible entry may be traversed. *276*
- RECUSANT.—*Vide Papist.*
- RE-DELIVERY.—*Vide Robbery*, N. 3.
- REGRATOR.—*Vide Engrossing.*

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RELIGION — *Vide Church. Lord's Day. Præsumptio. Heresy.*

REPUGNANCY.

- 1 In what cases it vitiates an indictment. *Page 285, 286*

RIOTERS.

- 1 The offence of **BLACK MAIL**, and how punished. 201
- 2 Offences by **MOSS TROOPERS**, how punished. *ibid. f. 2*
- 3 Clergy taken from felonious rioters in Cumberland and Northumberland. 202

RIOTS, ROUTS, and unlawful ASSEMBLIES.

- 1 A **RIOT** is a tumultuous disturbance of the peace by three persons or more, &c. &c. 392 c. 65
- 2 Force and violence in the prosecution of an *illegal* act, makes the offenders rioters. 294 f. 2
- 3 But to effect a *legal* act, even forcibly, by means of numbers, will not make the actors rioters. *ibid.*
- 4 Yet they are answerable for any *needless* outrage. *ibid.*
- 5 If numbers meet together innocently, as at a wake or fair, and a quarrel ensue, they are not rioters, but affrayers. *ibid. f. 3*
- 6 Otherwise if they had formed parties under the pledge of mutual assistance. *ibid.*
- 7 Especially if the notice of their confederacy be for illegal purposes of a *private* nature, as pulling down bawdy houses, &c. 295
- 8 And those who join such a confederacy, after it is once formed, are equally guilty. *ibid.*
- 9 The enterprize must be accompanied with some *offer* of violence, either to the person or possession of another. *ibid. f. 4*

10 Therefore, riding armed, in a manner conducing to terror, is only an unlawful assembly, and not a riot. *Page 295*

11 But the shew of armour, threatening speeches, turbulent gestures, &c. are sufficient *offers* of violence to maintain that the riot was *in terrum populi*; for it must be so laid to be done. *ibid. f. 5*

12 But if *any* number assemble, without circumstances of terror to do an act, under a *pretended* right, they are not rioters. 296

13 Nor to do an act contrary to the common law or statute; as to celebrate mass, &c. if they perform it peaceably. *ibid.*

14 If the object of an assembling be of a *public* nature, as to pull down all bawdy houses, &c. such rioters will be guilty of treason. f. 6

15 And *private* redress, even where authorized by law, must be executed in a *peaceable* manner, or the offenders, if to the number of three or more, will be rioters. f. 7

16 But, perhaps, the justice of such a case, though riotously pursued, would mitigate the offence. *ibid.*

17 A **ROUT**, seems to be an unlawful assembling of persons with an *intention*, and actually *moving* to do a thing, the execution of which would make them rioters. 296, 297

18 AN **UNLAWFUL ASSEMBLY**, is an assembling with circumstances of terror, with or without an *intention* to do a riotous act; but neither *executing* it or making any *motion* towards it. 297 f. 9

19 For a man cannot *simultaneously* assemble even his friends for the defence of his *person*, as he may for the defence of his *house*; but he must seek his security by obtaining sureties for the peace. f. 10

20 All peace *officers* may suppress a riot, and command the assistance of other persons for that purpose. f. 11

21 And as private persons may suppress an affray, *a fortiori*, they may assist and arm themselves, to suppress a riot. 298

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- 22 Riots which favour of rebellion, *they may certainly interpose to suppress, for, on such occasions, no remedy can be too sharp or severe.* Page 298
- 23 By 1 Geo. 1. c. 5. if twelve persons, riotously assembled, shall so continue together for one hour after proclamation, they may be apprehended by a peace officer and carried before a magistrate; and if the rioter happen to be killed, the officer shall be discharged. f. 11
- 24 Persons not actually engaged, but only aiding, &c. are principals in the second degree under this act. *Note in mar.*
- 25 But this statute does not abridge the authority which either officers or private persons have at common law. f. 11
- 26 By the common law rioters may be punished, according to the degree of the offence, by fine and imprisonment, pillory and forfeiture of lands. f. 12
- 27 Corporators punishable in their natural capacity for suffering riots within their jurisdictions. f. 13
- 28 Women are punishable as rioters, but not infants wanting discretion. 299
- 29 By 34 Edw. 3. c. 1. *one* justice of the peace has authority over rioters; to restrain, arrest, and chastise them. f. 15
- 30 He may authorize their arrest *by* *parol*; and commit for not giving sureties. f. 16
- 31 But *one* justice cannot by virtue of this act record a riot, or enquire of it after it is over; but he may by virtue of the statute of Northampton (*vide p. 266.*) because under the first he acts ministerially, and under the second judicially. f. 17
- 32 And where a justice is authorized to make a record, the fact he records is not traversable. 300
- 33 By the common law, as a contravator, and by 17 R. 2. c. 8. a justice may raise the *posse* to suppress a riot. f. 18
- 34 By 13 Hen. 4. c. 7. *two* justices with the sheriff, may record a riot; and convict the offenders in the manner described by 34 Ed. 3. c. 1. (*vide p. 266.*) Page 300 f. 19
- 35 And for the purpose of suppressing the riot, they may raise the *posse*; which even noblemen are obliged to attend, who may arm themselves with proper weapons. 301 f. 20
- 36 And this they may do, not only upon view, but information of the riot, and upon seeing any detached parties of the rioters; yet if they alarm the county frivolously, they shall be punished. f. 22
- 37 After view they may record the riot, although the rioters are in custody, and upon fresh suit may retake any who shall escape;—but afterwards the record must be sent to the king's bench, and process to retake must thence issue—they may, however, at any time arrest rioters to compel sureties for behaviour. 302
- 38 If one bound by a recognizance of the peace, be included in the record of the riot, the production of it against him is conclusive. f. 25
- 39 But if the record contain a charge of felony, or maim, or rescous; yet it is conclusive only as to the riot. f. 26
- 40 This record, being a conviction, ought to be certain and very circumstantial; it should shew that the parties are guilty, and how far guilty within the statute; that the justices have pursued their power, &c. f. 27
- 41 How such convicted rioters may be punished. f. 28
- 42 By 13 Hen. 4. c. 7. if the rioters are dispersed before the two justices, sheriff, or under-sheriff, arrive, the justices (without the sheriff p. 304 f. 33.) may, within a month after, enquire, hear, and determine the offence according to law. 303 f. 29
- 43 By 19 Hen. 7. c. 13. the sheriff, for this purpose, is directed to return a jury of 24 persons, &c. who shall be fined for disobedience. f. 30
- 44 It is not settled whether the power of the justices is confined to a lunar or calendar month. f. 31
- 45 But this authority extends to *all* the justices within the county; who may award

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- award process under their own teste, &c. *Page 304 f. 34*
- 46 It is questionable whether the justices can discharge rioters upon submitting to a fine, without imprisonment. *f. 35*
- 47 Formerly rioters might be fined both by the justices and by the *star chamber*. *f. 36*
- 48 By 13 Hen. 4. c. 7. the justices and sheriff may certify the record to the privy (*Vide p. 306 f. 41.*) council; which shall have the effect of a PRESENTMENT, and the offender may be tried thereon: but the certificate may be traversed and tried in king's bench, and if the offenders do not appear on proclamation, they shall be attainted of the riot. *305*
- 49 Punishment and process against the jury, if they are guilty of maintenance, &c. *f. 38*
- 50 The certificate may be made by the justices who recorded the riot; but it is most proper to be made by those who took the enquiry. *f. 39*
- 51 And if they neglect so to do, they shall forfeit 20*l.* *ibid.*
- 52 And the said certificate must be made within a month after the enquiry. *306 f. 40*
- 53 And if the enquiry is obstructed, the certificate should contain the causes of the obstruction. *ibid.*
- 54 If there be any variance between the inquisition and the certificate, that which is most for the king's advantage, shall be preferred; but *qu.* if they differ only in the time. *f. 42*
- 55 And the certificate being in the nature of an indictment, it should be certain and circumstantial; but *qu.* if the addition of the offenders need be inserted. *f. 43*
- 56 And if the justices neglect to put 13 Hen. 7. c. 13. into execution, they shall forfeit 100*l.* *307*
- 57 But to incur this penalty the justices must live within the county, and if any justice execute the act, it excuses the rest. *f. 45, 46*
- 58 Only those who dwell nearest the riot, are liable, but if the nearest justice die, the next in vicinity is bound to execute the act; and if any others, on notice, of which the notoriety of the fact is sufficient, neglect to supply their default, they are fineable. *Page 307 f. 47, 48, 49, 52*
- 59 A partial execution of the act will not excuse from the penalty; but it is only in enormous riots, as rebellion or insurrections, that they are liable. *f. 50, 51*
- 60 No acquiescence of the parties will excuse the justices. *f. 53*
- 61 How rioters may be outlawed. *308*
- 62 The penalties of the foregoing statutes found ineffectual, therefore by 1 Geo. 1. c. 5. if twelve or more, riotously assembled, do not disperse upon proclamation by the magistrate, but shall continue together for one hour afterwards, or shall hinder the magistrate from making the proclamation they shall be felons without benefit of clergy. *309 f. 56, 57*
- 63 And if *any persons* riotously assembled shall demolish or begin to pull down any church, chapel or any building for religious worship registered according to 1 W. & M. c. 18. or any dwelling-house, barn, stable, or other out-house, felony without clergy. *f. 58*
- 64 The inhabitants or hundred made liable. *f. 59*
- 65 By 9 Geo. 3. c. 29. the above penalties extended to the riotous demolition of mills. *f. 60*
- 66 By 13 Car. 2. c. 5. no petition shall be signed by more than 20 persons, &c. *f. 61*

RIDING ARMED.

- 1 By 2 Edw. 3. none, except the king's attendants, or officers and their assistants executing his precepts; or upon a cry of arms, shall appear armed before any justices; nor ride armed in fairs or markets on pain of forfeiting their armour and imprisonment. *266 l. 4*
- 2 And all justices, magistrates, and peace officers are to execute this act upon pain of punishment by the judges of assize. *ibid.*
- 3 Pro-

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- | | |
|--|--|
| <p>3 Proceedings may be either <i>ex officio</i> or by writ out of chancery, but a record of them should be made and returned, if done <i>ex officio</i>, into the exchequer, if by writ, into chancery. Page 267 f. 5</p> <p>4 Offenders may be imprisoned not only upon view of the offence; but upon an inquest taken of it. <i>ibid.</i> f. 6</p> <p>5 The under-sheriff may execute the writ officially, except it be specially directed. f. 7</p> <p>6 None shall wear armour publicly upon pretence of protecting his person; but a man may assemble his neighbours to protect his house without incurring the penalties of the statute. f. 8</p> <p>7 But no wearing of arms is within the statute unless they are such as may terrify; therefore the weapons of fashion as swords, &c. or privy coats of mail may be safely worn. f. 9</p> <p>8 Neither are those within the intention of it who arm for the purpose of suppressing, dangerous, tumultuous or noisy insurrections. 268 f. 10</p> | <p>2 Property obtained in consequence of an oath extorted by fear is a sufficient taking to satisfy the word <i>rapit</i>. Page 147 f. 1</p> <p>3 Robbery once completed cannot be purged by a re-delivery of the property taken; the reason of this rule of law. <i>ibid.</i> f. 2</p> <p>4 An attack in order to rob, is only a misdemeanour at common law. <i>ibid.</i> f. 3</p> <p>5 But by 7 Geo. 2. c. 22. an assault with intent to rob is made single felony. 148</p> <p>6 By 23 Geo. 3. c. 88. any person apprehended with implements of robbery, with intention to commit the offence shall be deemed a rogue and vagabond. <i>ibid.</i></p> <p>7 If one of a gang only take the money yet his confederates are all equally guilty. <i>ibid.</i></p> <p>8 Confederates in robbery may be guilty, although they are not present when the property is taken. <i>ibid.</i></p> <p>9 Taking any thing from the care and protection of another openly and before his face, shall be considered as a taking from his person. <i>ibid.</i></p> <p>10 This rule illustrated. <i>ibid.</i></p> <p>11 The fear must be excited before the property is taken, or the taking will amount to larceny only. <i>ibid.</i></p> <p>12 An actual assault, with a weapon, is not necessary in order to excite the sort of fear that will constitute robbery. 149</p> <p>13 Nor need the fact of actual fear be either laid in the indictment or proved upon the trial. <i>ibid.</i> (N) 4</p> <p>14 It is sufficient if the offence be charged to be done <i>violenter et contra voluntatem</i>. <i>ibid.</i></p> <p>15 Proof of such circumstances as are likely to induce a man to part with money for the safety of his person, or preservation of his character is sufficient. <i>ibid.</i></p> <p>16 What acts will amount to implied fear. <i>ibid.</i></p> <p>17 <i>Quare</i> if it be robbery to force another to part with his goods at a fair price. 149 f. 7</p> |
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- | | |
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| <p>1 It is a common nuisance to divert part of a navigable river so as to weaken its current. 363</p> <p>2 So also to lay timber in a public river so as to obstruct its intercourse. <i>ibid.</i> (N) 1</p> <p>3 To place a floating dock in a public navigable river however beneficial to the repair of shipping is a nuisance. <i>ibid.</i></p> <p>4 Who are bound to remove a nuisance in an inland river. 365</p> <p>5 A river, common to all men is called a highway. 366</p> | <p>18 The</p> |
|---|---------------|

R O B B E R Y.

- | | |
|--|---------------|
| <p>1 Robbery is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear. 147 c. 34</p> | <p>18 The</p> |
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- 18 The claim of property in the thing taken will not excuse from the guilt of robbery. *Page 149 f. 8*
- 19 Robbery shall have judgment of death, how small soever the value of the thing taken may be; but other larcenies must be above 12*d.* *f. 9*
- 20 Robbery, unlike all other larcenies, must be laid to be done violently, &c. *149, 150*
- 21 By 23 Hen. 8. c. 8. principals and accessaries before in robbery committed in or near about the highway, are ousted of clergy. *150*
- 22 By 4 P. & M. c. 4. accessaries after are debarred. *ibid.*
- 23 By 3 & 4 Will. & M. c. 9. robbery is ousted generally. *ibid.*
- 24 But the words of 23 Hen. 8. are pursued in indictments. *ibid.*
- 25 By 4 Will. & M. c. 8. those who apprehend and convict robbers, are intitled to 40*l.* &c. &c. *ibid.*
- 26 By 6 Geo. 1. c. 21. the streets of London are deemed highways within the 4 W. & M. *ibid.*
- 27 There is also a reward of 10*l.* for exonerating the hundred, &c. *ibid.*

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- 1 Spreading of false rumours concerning the king's intentions, as that he intends to grant toleration to papists, &c. is a contempt of his person and government. *92*
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- 1 By 23 Eliz. c. 1. every schoolmaster who is not a protestant, shall be allowed by the bishop, or forfeit 10*l.* a month, and suffer imprisonment for one year. *18*
- 2 By 1 Jac. 1. c. 4. no person shall keep other than a public or free grammar school, except in the universities, or in some protestant family, on pain of 40*l.* &c. *ibid.*
- 3 By 11 & 12 Will. 3. c. 4. perpetual imprisonment is inflicted on popish schoolmasters not conforming to the 18 Geo. 3. c. 60, *46*

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- 4 Homicide by a schoolmaster, in correcting his scholar, will be murder or manslaughter, according to the propriety or impropriety of the mode of correction. Page 111

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- 1 By 22 Hen. 8. c. 11. to destroy the banks which secure the dykes in the counties of Norfolk and Cambridge, is felony. 198

- 2 By 10 Geo. 2. c. 32. to remove any of the piles or materials for securing any sea walls or banks, incurs a penalty of 20*l.* 199

- 3 The provisions of the black act, 9 Geo. 2. c. 22. shall extend to all offences of destroying sea banks, &c. 200

- 4 By 6 Geo. 2. c. 37. maliciously to destroy any sea bank, whereby any lands shall be damaged, is felony without clergy. *ibid.*

- 5 By 15 & 16 Geo. 2. c. 33. to destroy the *flarr*, or bent, planted on the Northwest coasts, for the purpose of supporting the sea banks, incurs a penalty of 20*s.*

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- 9 By 15 Geo. 2. c. 13. servants of the bank of England, embezzling the property they are intrusted with, shall suffer death without benefit of clergy, (*vide Bank of England*). 139, 140
- 10 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. servants of the post-office robbing any letter, &c. of the securities therein, are guilty of felony without clergy, (*vide post-office*). 140
- 11 By 7 Jac. 1. c. 7. and 17 Geo. 3. c. 56. servants in the several trades therein mentioned, who embezel the materials delivered to them to manufacture, shall be punished by fine and imprisonment, &c. *ibid.*
- 12 A servant who opens his master's chamber door in the night to commit a felony, or who opens the house-door to let in a thief, is guilty of burglary. 164
- 13 By 33 Hen. 6. servants who spoil their master's goods, &c. at the time of his death may be proclaimed, and on not appearing may be attainted of felony. 197
- 14 By 6 Ann. c. 31. menial servants negligently setting fire to their masters' house shall forfeit 100*l.* &c. 197
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- 20 If a servant kills his master, he is guilty of petty treason. 131

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- 1 By 8 Eliz. c. 3. to export rams, sheep, or lambs, incurs forfeiture for the first offence, a years imprisonment and the loss of the left hand for the second, and the third offence is felony. 195

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- 1 A shepherd who has the care of sheep, may be guilty of larceny by taking them feloniously away. 136 f.6

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- 1 By 12 Ann. c. 18. magistrates and officers, upon information of any ship being in distress shall appoint what assistance, &c. is necessary for her preservation, and salvage of the goods. 219
- 2 Whoever refuses or neglects this duty shall forfeit 100*l.* *ibid.*
- 3 And if any other than such as are appointed, shall interfere, they shall be resisted, &c. *ibid.*
- 4 If any goods be stolen, the person on whom they are found, shall forfeit treble the value. *ibid.*
- 5 And if any person shall make, or assist in making, any hole in any ship or vessel in distress, or shall steal any pump from her, or aid in so doing, or shall do any thing tending to the immediate destruction of such ship or vessel, he shall be guilty of felony without benefit of clergy. 219, 220
- 6 By 26 Geo. 2. c. 19. whoever shall plunder the effects of ships in distress; or shall beat, &c. any person endeavouring to escape therefrom; or put out any false lights to deceive such ship, shall suffer death without benefit of clergy. 220
- 7 But the offender may, if not guilty of violence and cruelty, be prosecuted for larceny only. *ibid.*
- 8 If any magistrate, officer, &c. shall be assaulted or wounded in endeavouring to save goods from shipwreck, he shall be transported for seven years. *ibid.*
- 9 If the offence be committed in Wales, it may be tried in the next adjoining English county. *ibid.*
- 10 *Salop* the next adjoining county to *Anglesea*. *ibid.* (N)
- 11 By 22 & 23 Car. 2. c. 11. and 1 Ann. c. 2. if any person shall will-

fully cast away or destroy the ship to which he belongs to the prejudice of the owners or freighters, he shall suffer death without clergy. *Page 185*

- 12 If committed in the admiral's jurisdiction the offender may be tried as a pirate. *ibid.*
- 13 By 4 Geo. 1. c. 12. if this offence is committed to the prejudice of the underwriters, the offender shall suffer death, which by the 11 Geo. 1. c. 21. is explained to mean without benefit of clergy. 185, 186

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- 1 By 10 & 11 W. 3. c. 23. whoever shall privately steal from any shop to the value of 5*l.* is guilty of felony without clergy. 151 (N)

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- 1 By 9 Geo. 1. c. 22. if any person shall wilfully shoot at another, or shall rescue an offender, &c. he shall suffer death without clergy. 225
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- 1 In what this offence consists. Page
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- 2 By 8 Geo. 1. c. 18. s. 6. whoever shall be found passing with contraband goods within 20 miles of the coast, with more than five persons in company, or who shall be armed, or disguised, or who shall resist the revenue officers, &c. shall be guilty of felony and transported for seven years. *ibid.*
- 3 By 19 Geo. 2. c. 34. if three persons or more armed with offensive weapons, shall assemble to assist in the smuggling of goods, or in rescuing them after seizure; or in rescuing any offender against this act; or shall actually assist in so doing, shall be guilty of felony without clergy. 228
- 4 And if any three persons so armed, shall be aiding, or if any person shall be disguised when passing with contraband goods, or shall obstruct (*Vide infra* No. 14.) the revenue officers in seizing the same; or shall maim any officer in attempting to board any vessel; or shall shoot at him when on board, it is felony without clergy. *ibid.*
- 5 What shall be considered an offensive weapon within this act, is a fact for the determination of the jury. 227
(N) 1
- 6 The assembling (*Vide supra*, No. 3.) must be for the express purpose of assisting in the smuggling; persons who suddenly join such an assembly upon the alarm are not within this branch of the act. *ibid.* (N) 2
- 7 The branch of the act (*Vide supra*, No. 4.) has no regard to the number of persons; an individual with his face blacked, &c. would possibly be deemed within the act. 228 (N) 3
- 8 On the branch for obstructing (*Vide supra*, No. 4.) the prosecutor must give circumstantial evidence, that the

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- 9 Smugglers may be required, upon proclamation, to surrender themselves, and upon neglecting so to do, they may be attainted of felony without clergy. 228, 229
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- 12 To harbour a smuggler, to prevent his surrendering, is transportation seven years. 230
- 13 Several determinations which have been made upon this surrender clause. 230, 231
- 14 By 19 Geo. 3. c. 69. to obstruct any revenue officer in seizing contraband goods; or to rescue, or destroy, such goods when seized, or to attempt so to do, is made a *misdemeanor*.
- 15 By 24 Geo. 3. c. 47. maliciously to shoot at any revenue vessel, or boat, within any port, &c. or within four leagues of the coast; or maliciously to shoot, or maim, or dangerously wound, any officer of the navy or revenue, in the execution of their duty; or any persons aiding such officer, or to abet or assist therein, is felony without clergy. 221, 222
- 16 If an offender acts, by firing a gun, &c. under the compulsion of his captain, and from a well-grounded fear of the safety of his life, it is a ground of acquittal. *ibid.* note in mar.

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- 1 What it is, and how punishable. 9,
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2 To

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- 2 To refuse to serve the king against invaders, or in his wars abroad, is a contempt of the prerogative. *Page 91*
- 3 By 39 Eliz. c. 17. soldiers wandering without, or with a forged testimonial, &c. &c. are guilty of felony without clergy. (*VIDE MAIM.*) *183*
- 4 By 17 Geo. 2. c. 5. persons wandering and pretending to be soldiers, &c. shall be deemed rogues and vagabonds. *184*
- 5 By 18 Hen. 6. c. 19. soldiers departing from their captains, without licence, shall be guilty of felony. (*obsolete.*) *ibid.*
- 6 By 5 Hen. 7. c. 1. and 3 Hen. 8. c. 5. if any common soldier shall depart from his captain, without leave, during service, he shall be guilty of felony without benefit of clergy. *185*
- 7 By 2 Ed. 6. c. 2. if any soldier shall desert during actual service, with booty, &c. he shall suffer without clergy. *ibid.*
- 8 By 29 Geo. 2. c. 17. whoever shall enter into the service of the French king, as an officer or soldier, shall be guilty of felony without clergy. *75 & ibid. (N)*
- 9 The statutes regulating the conduct of soldiers in the service of the East India Company. *ibid.*
- 10 By 9 Geo. 2. c. 30. whoever shall enlist, or procure another to enlist as a soldier in the service of any foreign prince, without licence, shall suffer without clergy. *74*
- 11 To enter into the Scotch brigade, &c. incurs a penalty of 500*l.* *ibid.*
- 12 By 1 Geo. 1. c. 47. to persuade a soldier to desert, incurs a penalty of 40*l.* six months imprisonment, and pillory. *74*
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- 1 Sorcerers are those who use certain superstitious forms of words, images, or odd representations to produce preternatural effects. *Page 8*

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- 1 It has been determined that the 23 Geo. 3. c. 49. and 23 Geo. 3. c. 58. which require bills of exchange, &c. to be stamped, make no alteration in the crime of forgery: and that a forged bill upon untamped paper, is equally a forgery as if it had been stamped. *Rex v. Hawkefwood, 1783.*

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- 1 Where a statute expresses that which the law would have implied, it shall operate nothing: *expressio eorum quae tacite insunt nihil operatur.* Page 20
f. 8 p. 26 f. 33
- 2 An affirmative statute shall not abrogate any part of a former statute with which it is consistent. 26 f. 35, 37
- 3 An affirmative statute saving a special jurisdiction, leaves the mode of proceeding therein unaltered. 14
- 4 Where a statute makes no new offence, but only takes away a privilege, an indictment thereon need not conclude *contra formam statuti*; and shall, if laid, be rejected as surplusage. 116
- 5 Where the words of a statute are not properly pursued the conclusion *con. for. stat.* will not cure the defect. 117
- 6 Where the meaning of a statute is doubtful, the reason of the common law, ought to govern the construction of it. 58 f. 39
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- 14 Where a statute inflicts judgment of *life and member*, the offence is thereby incidentally made felony. 68
- 15 But felony shall not be inferred where the words of a statute are doubtful. *ibid.*
- 16 Where a statute makes a second offence felony, or inflicts an additional punishment, a conviction for the first is always implied. Page 168
- 17 The consequences of a statute creating a felony. 169
- 18 Where a statute saves corruption of blood, it impliedly saves the descent of land, dower, &c. *ibid.*
- 19 If a statute creating a felony be repealed after the offence is committed, the offender cannot be punished as a felon. *ibid.*
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- 1 By 3 W. & M. c. 9. and 5 Ann. c. 31. buyers or receivers of stolen goods shall be deemed accessaries after the fact. 232
- 2 By 4 Geo. 1. c. 11. they shall be transported for 14 years. *ibid.*
- 3 *Quere*, if *money* is within the meaning of the word *goods*; &c. *ibid.* (N) 1
- 4 By 2 Geo. 2. c. 25. *bank notes* are made *goods* within the meaning of the act. *ibid.*
- 5 *Sheep and rams* are *goods and chattels* within the act. *ibid.*
- 6 The *bare* receiving of stolen goods *knowingly* makes not an accessary, unless they are also *feloniously* received. *ibid.*
- 7 By 29 Geo. 2. c. 30. whoever shall buy or receive stolen lead, iron, copper, brass, bell metal, or silver—or shall privately take them in at any door

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- door, window-shutter, &c. left open after sunset, shall be transported for 14 years, *although the principal felon is not convicted.* Page 232, 233
- 8 If one justice upon the oath of credible persons have cause to suspect that such stolen articles are in the possession of any one, he may issue a warrant to bring him before two justices of the county, and if he do not give a satisfactory account how he came by them, he shall be fined, &c. 233
- 9 Officers may stop persons whom they may suspect to be carrying such articles and take them before the justices, *ibid.*
- 10 In what manner stolen goods so reclaimed, shall be disposed of. 233, 234
- 11 Private persons to whom such articles are offered must apprehend the offenders. 234
- 12 How the penalties shall be applied and laid. *ibid.*
- 13 By 2 Geo. 3. c. 28. whoever shall buy or receive any part of the cargo or property belonging to any vessel in the river Thames, or privately receive the same clandestinely, shall be transported 14 years, *although the principal felon is not convicted.* 234, 235
- 14 By 10 Geo. 3. c. 48. buyers or receivers of stolen jewels, plate or watches, obtained by burglary or robbery shall be triable before as well as after the principal, whether he be in or out of custody, and transported 14 years. *ibid.*
- 15 By 21 Geo. 3. c. 69. buyers or receivers of stolen pewter, may be tried in the same manner and transported 7 years or confined, not less than one nor more than three years, and be three times publicly whipped. *ibid.*
- 16 By 22 Geo. 3. c. 58 whoever shall buy or receive any stolen goods, except lead, iron, copper, brass, bell metal and solder, may be tried for *the misfeasance*, whether the principal may be amenable to justice or not unless the principal is then convicted, &c. and punished by fine, imprisonment and whipping as the court shall direct. 230
- 17 Justices on information or suspicion may apprehend and convict, &c. &c. (*vide supra* No. 8, 9, 10.): Page 236, 237
- 18 By 4 Geo. 1. c. 11. to take a reward upon pretence of helping a person to his stolen goods, involves the offender in the same guilt as if he were the actual thief. 237
- 19 By 25 Geo. 2. c. 36. to advertise a reward for the restoration of stolen goods incurs a penalty of 50*l.* *ibid.*
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- 1 By the test act 25 Car. 2. c. 2. all
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- 2 It is where one not only knows of a
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- 3 By 6 Ann. c. 7. to affirm that the pretender hath any title to the crown, or that any other hath title than according to the settlement of 1 W. & M. c. 2. and 12 W. c. 2. is *præsumere*. Page 84

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- 1 By the toleration act 1 W. & M. c. 18. all persons dissenting from the church, except papists, and those who deny the Trinity, are exempted from all penal laws relating to religion, other than 25 Car. 2. c. 2. and 30 Car. 2. c. 1. 47
- 2 Dissenting teachers are tolerated if they take the oaths enjoined by 1 W. & M. and 19 Geo. 3 c. 44. and subscribe the 39 articles, except those relating to church government and infant baptism. 48
- 3 In what manner the toleration act shall be construed. 49 f. 2

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- 1 A description of the offenders liable to transportation to America. 244
- 2 By 4 Geo. 1. c. 11. if any such offenders shall return before the expiration of his term, he shall be guilty of felony without clergy. *ibid.*
- 3 In what case the prison-book shall be evidence to prove the discharge of a prisoner under a conditional pardon to transport himself within a given time from the day of his discharge. *ibid.* (N) 1
- 4 It has been determined that an act of parliament ordering transportation

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- 5 By 6 Geo. 1. c. 23. if any felon ordered for transportation shall be at large before the expiration of his term he shall suffer death without clergy. 245 f. 2

- 6 If an offender confess the fact the court will record his confession. *ibid.* (N) 3

- 7 To prove the offence the record of his conviction must be produced; the averments in the indictment must be correspondent, and evidence must be given of the prisoner's identity. *ibid.*

- 8 In what manner such offender may be tried, and the record of his former conviction certified to the court. 245 f. 3

- 9 By 16 Geo. 2. c. 15. if any felon who has agreed to transport himself to America, shall be afterwards at large in Great Britain without lawful cause, he shall suffer without benefit of clergy. *ibid.* f. 4

- 10 By 8 Geo. 3. c. 15. if felons who have been reprieved and afterwards pardoned in the manner the act directs upon conviction of transportation shall be afterwards at large, &c. &c. they shall suffer without benefit of clergy. 246 f. 5

- 11 The case of Maximilian Miller stated. *ibid.* (N) 4

- 12 By 19 Geo. 3. c. 74. on account of the emancipation of the American colonies, convicts are ordered to be transported to such parts beyond the seas, as the court shall think fit. 246 f. 6

- 13 And if they return, they shall be subject to the penalties inflicted by the acts above mentioned. 247 f. 7

- 14 The case of John Henry Aickles stated. *ibid.* (N) 3

- 15 Male offenders ordered to labour on board the hulks in lieu of transportation. 248

- 16 If any person ordered to hard labour shall escape before the expiration of his term, he shall suffer three years additional imprisonment, and for a second escape felony, without clergy. *ibid.* f. 10

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- 17 The penitentiary houses for the confinement of female offenders never carried into execution. *Page* 248 f. 10
 18 By 24 Geo. 3. c. 56. offenders liable to be transported by the statutes abovementioned, shall be transported to such places as his majesty, by the advice of his council shall think fit. 248 249
 19 And if any convict so transported, shall be found at large, &c. &c. he shall suffer death without benefit of clergy. 249 f. 12
 20 By 25 Geo. 2. c. 46. the laws of transportation are extended to Scotland. 249, 250
 21 By 27 Geo. 3. c. 2. Convicts are ordered to be transported to Botany Bay. *Vide Book the second page.* 514

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- 1 By 12 Ann. c. 14. the ordinary may tender the declaration against transubstantiation to any reputed papist making a presentation, and upon refusal the presentation shall be void. 45 f. 7.
 2 By 30 Car. 2. c. 1. members of both houses of parliament are bound to make a declaration against transubstantiation. 47
 3 By 1 Geo. 1. c. 2. all persons who bear any office shall (*inter alia*) subscribe against transubstantiation. 16

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- 1 In what case the attorney general may take a *traverse* upon a *traverse*. 444 f. 5
 2 How presentments in a court leet are traversable. 415, 420
 3 A justice's record of a riot, in what cases not traversable. 300, 302
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 5 Whoever has power to try the principal matter may also try a traverse of any incidental matter necessary for the determination of it. 276, 290 to 293, 304
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TREASON.—*Vide Petty Treason.*

- 1 Treason is of two kinds; high treason and petty treason. 49, 131
 2 By 33 Hen. 8. c. 20. repealed by 1 & 2 P. & M. c. 10. it was enacted that a madman might be punished as a traitor. 2
 3 A wife shall not be deemed guilty of treason for receiving her husband who has committed it. 4
 4 But if a wife join in or do the act of treason, no pleas of coverture or coercion shall extenuate her guilt. *ibid.*
 5 HIGH TREASON was anciently a crime of a very indefinite and unsettled description; instances given. 49 f. 1
 6 But by 25 Ed. 3. c. 2. reinforced by 1 M. c. 1. all treasons are settled; and so remain, except those created since 1 Mary (*vide infra*, No. 72.) 49 f. 2
 7 By 25 Ed. 3. c. 2. to compass or imagine the death of the king, queen, or heir—to violate the king's wife, his eldest daughter, unmarried, or the wife of his heir—to levy war against the king, or to adhere to his enemies in his realm, giving them aid and comfort—on attainder by *open deed*, is high treason. 50
 8 All persons of the age of discretion, and of sane memory, may be guilty of treason. *ibid.*
 9 The subject of a foreign prince, while resident in England, may be guilty of treason. The manner of laying the charge in the indictment; *ibid.* f. 5
 10 Even an ambassador, for treason against the life of majesty, may be condemned and executed here. 51
 11 But for other treasons he shall be sent home. *ibid.*
 12 How the charge may be laid. *ibid.* 13
 13 Aliens

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- 23 Aliens who invade the kingdom cannot be tried *as traitors*, they must be dealt with by *martial law*. Page 51 f. 6
- 24 If an alien, resident here, should, during war, go to his native country and there adhere to the king's enemies, *leaving family and effects in England*, he may be dealt with as a traitor.—*Foster* 185. *ibid.*
- 25 A natural born subject cannot renounce his allegiance; no time or circumstance can prevent his treachery from being punished. 51 f. 7
- 26 The fact of killing the king may be laid in the indictment as an overt act of compassing his death. *ibid.* f. 8
- 27 An enumeration of circumstances which are considered to amount to overt acts of compassing the king's death. *ibid.* f. 9
- 28 But the guilt commences only when *some measure* is taken to effectuate the guilty purpose. *ibid.* (N) 1
- 29 Every thing wilfully and deliberately designed, or attempted to be done, whereby the life of majesty may be endangered, is an overt act of compassing his death. *ibid.*
- 30 But an accident, however fatal, shall not be considered as an overt act of guilt, even in high treason. 51 f. 10
- 31 Every king *in possession* of the throne, but no other, not even the rightful sovereign, is a king within the protection of the statute of treasons—the reasons of it. 52
- 32 The history of the distinction between a king *de jure*, and *de facto*. *ibid.*
- 33 Allegiance is so indispensibly the right of a king *de facto*, that subjects are bound by it to resist a king *de jure* only. *ibid.*
- 34 The absurdity of considering the murderers of Charles the first, as traitors to Charles the second, while he was *out of possession* and the resistance of him as a king *de jure*, reconciled, by an *ex post facto* vote, that he was a king *de facto* though *out of possession*. 53
- 35 Upon the death of a king in actual possession, his heir is a king, within the statute before his coronation. *ibid.* f. 19
- 36 It is a maxim that the king never dies. Page 53 f. 19
- 37 A *titular* king, as the husband of a *queen regnant* is not within the statute. 53 f. 20
- 38 A *queen regnant*, though not within the words, is a *king* within the meaning of the act. *ibid.*
- 39 By 1 Will. & Mar. c. 2. papists and those who marry a papist are excluded from the throne; and, if they attain it, the people are absolved from their allegiance. *ibid.* f. 21
- 30 No queen or princess dowager is within the statute of treasons. *ibid.* f. 22
- 31 A *queen consort*, or the wife of the prince, consenting to an adulterer, are traitors within the act. *ibid.*
- 32 The son of a queen regnant is a prince and heir within the act. *ibid.*
- 33 A queen divorced *a vinculo*, &c. is not within the act. *ibid.* (N) 2
- 34 Nor the wife of a king's second son. *ibid.*
- 35 It is not treason to violate the king's eldest daughter who hath been married. *ibid.*
- 36 *Quære* whether a collateral heir apparent be within the statute unless so declared by parliament. *ibid.*
- 37 In a forcible manner to resist the king's authority is a levying war against him. 54
- 38 To hold a castle against his forces, or to support armed numbers against his command is a levying of war. *ibid.* f. 24
- 39 But those who join rebels for fear of death, and escape from them when opportunity offers are not traitors. *ibid.*
- 40 The kind of fear, and the extent of the constraint which is necessary to form this excuse, and whether it is to be strictly construed. *ibid.* (N) 3
- 41 The degree of force and practicability of escaping, are facts for the consideration of the jury. *ibid.*
- 42 How far an insurrection to redress a public grievance shall be considered high treason. 54 f. 25
- 43 An attempt by intimidation and violence to force the repeal of a law is

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- a levying of war against the king. Page 54 (N) 4
- 44 An insurrection to remove a grievance in which the insurgents have a special interest is not a levying of war. 55
- 45 How coadjutors in treason shall be contracted within the guilt of the principal offender upon a special verdict. *ibid.* f. 26
- 46 Those who are found in a special verdict to have suddenly joined the insurgents, and to have flung up their caps and hollowed with them, are only guilty of riot. *ibid.*
- 47 A conspiracy to levy war cannot amount to treason. f. 27
- 48 But a conspiracy may be alledged as an overt act of compassing the king's death. *ibid.*
- 49 There may be a levying of war without actual fighting. *ibid.*
- 50 By the expired acts of 13 Eliz. and 13 Car. 2. *conspiracy* to levy war was declared high treason. *ibid.* (N) 5
- 51 Any assistance given to aliens in open hostility against the king; as surrendering a castle, selling arms, cruising with a ship, is an adherence to the king's enemies. 55 f. 28
- 52 It is not necessary to alledge that such adherence was against the king. *ibid.*
- 53 But the special manner of adherence must be set forth. *ibid.*
- 54 Succouring a rebel in a foreign realm, is not an adherence to the king's enemies; for a rebel is not properly an enemy. *ibid.*
- 55 It is necessary to aver that the persons adhered to were the king's enemies; a fact which may be evidenced by its public notoriety. 55 (N) 6
- 56 Proclamation of war not always necessary. *ibid.*
- 57 Some overt act must be alledged in every indictment of treason. 56
- 58 What may be alledged as overt acts of compassing the king's death. 56 f. 30, 31 and (N) 7
- 59 Written words has been holden to be an overt act of compassing the king's death. 56 f. 32
- 60 The great question examined whether words only spoken can amount to an overt act. 57 to 61
- 61 Words joined to an act may explain it. Page 57 f. 37
- 62 Bare words are not overt acts of treason unless uttered in contemplation of some traitorous purpose actually on foot, or intended, and in prosecution of it. 60 (N) 11
- 63 By 25 Edw. 3. c. 2. if a man slay the chancellor, treasurer, or the judges in the execution of their offices, it is high treason. 60, 61
- 64 This branch of the act shall not be extended to other officers than those expressly named, nor to any attempt to kill or actual wounding, unless death ensue. 61 f. 47
- 65 Neither the barons of the exchequer, nor commissioners of the great seal are within it. *ibid.* (N) 12
- 66 By 7 Ann. c. 21. to slay the judiciary or lords of session in Scotland, in the execution of their office, is high treason. *ibid.*
- 67 By 25 Edw. 3. c. 2. to counterfeit the king's great or privy seal is high treason. 61 f. 48
- 68 Aiders and consenters are within this clause. f. 49
- 69 No intent to do it will amount to treason. f. 50
- 70 Fixing the great seal to a patent without a warrant so to do, is not high treason. f. 51
- 71 No abuse in misusing the impression of the great seal; nor any alteration of the instrument to which it is affixed will amount to a counterfeiting of it. f. 52
- 72 By 1 Mary, c. 6. counterfeiting the sign manual or privy signet is high treason. f. 53
- 73 By 7 Ann. c. 21. to counterfeit the seals used in Scotland is high treason. f. 53
- 74 By 25 Edw. 3. c. 2. to counterfeit the king's money—to bring false money into the realm, like the money of England, is high treason. f. 54
- 75 To coin money without the king's authority, is high treason within this clause. 62 f. 55
- 76 Minters making money of improper alloy are guilty of high treason. *ibid.*
- 77 Receivers

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- 77 Receivers and counterfeiters of the offender are principals. *Page 62*
- 78 In the counterfeited money must be similitude and probable currency or the crime is uncomplete. (N) 13
- 79 To utter false money made within the realm is not within the act, (*vide infra*, No.) 62 f. 56
- 80 By 1 M. c. 6. to counterfeit foreign gold or silver coin, made current in the realm, or to aid therein, is high treason. 62 f. 59
- 81 By 14 Eliz. c. 3. to counterfeit foreign gold or silver coin, not made current, is misprision of treason. f. 60
- 82 By 5 Eliz. c. 11. to wash, clip, round, or file, for gain, either English or foreign coin, made current by proclamation, or to aid therein, is high treason. 63 f. 61
- 83 By 18 Eliz. c. 1. to impair, diminish, falsify, scale, or lighten such monies, or to aid therein, is high treason, but without corruption of blood. f. 62
- 84 By 8 & 9 W. 3. c. 26. to make or mend any instrument or utensil therein named, which will impress the resemblance of the coin, &c. &c.—or to make any edging tool to grain the edges of money—or any press for coinage—or any engine for cutting blanks—or to have such instrument, &c. in custody, &c. is high treason. 64
- 85 By 7 Ann. c. 25. the prosecution must be within six months. *ibid.*
- 86 By 8 & 9 W. 3. c. 26. to convey any coining instrument out of the mint—to mark coin on the edges—to diminish the coin, or to aid in so doing, is high treason. *ibid.*
- 87 By 8 & 9 W. 3. c. 26. to colour, gild, case over, or work any round blanks of base metal, to resemble the current coin, &c. or to make the silver coin resemble the gold, or to aid therein, is high treason. *ibid.*
- 88 To extract a colour from the substance of the metal, by chemical process, is a *colouring* within the meaning of this clause. *ibid.* (N) 16
- 89 The tools or instruments for coining found in the custody of an offender, may be seized and destroyed. 65
- 90 By 15 Geo. 2. c. 28. to wash, gild, or colour any of the silver coin, so as to make it resemble the gold coin—or to file, alter, wash, or colour, any of the brass monies, so as to resemble the silver coin of sixpences or shillings, or to counsel or aid therein, is high treason. *Page 65 f. 64*
- 91 There must be a similitude, & resemblance of the true money counterfeited, or the crime is incomplete. (N) 17
- 92 By 1 & 2 Ph. & M. c. 11. to bring into the realm, money counterfeited according to the similitude of foreign coin current here, is high treason. 65 f. 65
- 93 It must be known to be false. f. 66
- 94 It must be brought from some country where counterfeiting is not punishable by the laws of England. f. 67
- 95 Barely uttering such money, is not high treason. 66
- 96 By 25 Ed. 3. c. 2. if any new case, necessary to be considered as high treason, should arise, the judges shall not give judgment of treason upon it, except it has been previously declared to be treason by act of parliament. 66 f. 70
- 97 How treasons were made by virtue of this clause, but by 1 Mary, no offence shall be high treason, not so declared to be by 25 Ed. 3. f. 71
- 98 By 5 Eliz. c. 1. by writing, or advised speaking, to extol or maintain the jurisdiction of THE POPE, is *præmunire* for the first offence, and high treason for the second. 69 f. 72
- 99 Knowingly to import, commend, or recommend a book, though written beyond sea, which maintains this jurisdiction is within the statute, &c. &c. f. 73
- 100 To avow the same opinion after a first conviction, is high treason. f. 74
- 101 By 13 Eliz. c. 2. to put in use any popish bull; or instrument of absolution, or to purchase any such, is high treason. f. 75
- 102 Accessories after the offence incur *præmunire*. *ibid.*
- 103 Concealing the offences for six weeks, is *misprision of treason*. *ibid.*

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- 104 By 23 Eliz. c. 1. and 3 Jac. 1. c. 4. to become perverted to popery, or to pervert, or endeavour to pervert others to that religion, &c. is high treason. *Page 68 f. 76*
- 105 By 3 Jac. 1. c. 4. if any such offender, beyond seas, return in six weeks, and take the oaths, &c. he is excused. *f. 77*
- 106 The barely pretending to have power to persuade persons from their allegiance, is within these acts. *f. 78*
- 107 By 27 Eliz. c. 2. if any English ecclesiastic, ordained a popish priest, shall remain in the realm, and not submit to a justice within three days, he shall be guilty of high treason. *f. 79*
- 108 If any lay subject shall not return from a popish seminary, within six months after proclamation, and submit within two days after his return, he shall be guilty of high treason. *f. 80*
- 109 To conceal that a popish priest is in the realm, from a justice for twelve days, is fine and imprisonment at discretion; if a justice shall not discover it to the privy council within twenty-eight days, he shall forfeit 200 marks. *f. 81*
- 110 An indictment upon the clause No. 107, must shew that the offender was born in the realm, and that he was ordained by papal authority. *f. 82*
- 111 Such an offender, thrown by winds upon the English coast, in his passage to Ireland, is not within the act. *69*
- 112 By 5 Eliz. c. 1. if any person performing the duty, or enjoying the preferment of the Romish church shall refuse a second tender of the oaths, it is high treason. *69 f. 84*
- 113 By 4 Ann. c. 8. & 6 Ann. c. 7. to maintain by *writing*, that the pretender, or any other, hath a right to the crown, other than according to 1 W. & M. c. 2. or 11 & 12 W. 3. c. 2. or that parliament cannot limit the descent of the crown, is high treason. *f. 85*
- 114 To affirm the same by *advised speaking*, is *praemunire*. *ibid.*
- 115 By 1 Ann. c. 7. Endeavouring advisedly and directly to hinder any person who shall be next in succession, according to 1 W. & M. c. 2. and 12 W. 3. c. 2. is high treason. *Page 85*
- 116 By 13 W. 3. c. 3. the pretender is convicted and attainted of high treason. *f. 86*
- 117 By 13 W. 3. c. 3. and 17 Geo. 2. c. 39. if any subject of England shall hold any correspondence with the pretender, or with the son or sons of the pretender, or any person employed by them, it is high treason. *69*
- 118 By 2 & 3 Ann. c. 20. if any officer or soldier shall hold correspondence with any rebel or enemy, by any ways or means whatsoever, without authority, it is high treason. *70 f. 8-*

TREASURE TROVE.

- 1 He who takes away *treasure trove* before it has been seized by the persons who have a right thereto, is not guilty of felony, but shall be only punished by fine, &c. *144*

TREES.

- 1 Trees, being affixed to the freehold, could not become the subject of larceny at common law. *141 f. 21*
- 2 By 43 Eliz. c. 7. to steal or destroy any trees, which it is not felony at common law to steal, is punishable by compensation at discretion, and by public whipping. *214*
- 3 In a conviction on this act the number and nature of the trees must be set out. *ibid. (N)*
- 4 The manner in which the offence was committed must also be stated. *ibid.*
- 5 A gentleman who is guilty within this act, is liable to the penalties. *ibid.*
- 6 By 15 Car. 2. c. 2. the houses of suspected offenders may be searched. *214*
- 7 By 1 Geo. 1. c. 48. to destroy any timber, fruit, or other tree, on conviction by two justices, is hard labour three months, to be whipped once a month, and find surety for two years. *ibid. f. 2*
- 8 The

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- 8 The party grieved may recover damages against the parish. *Page* 214 f. 2
- 9 This act gives no *pecuniary* penalty, the conviction therefore should be *quod foris faciat, or quod committitur, &c.* *ibid.* (N)
- 10 By 6 Geo. 1. c. 16. to steal or destroy any tops of trees, poles, or underwoods, &c. &c. is punishable according to 1 Geo. 1. c. 48. 215 f. 3
- 11 By 6 Geo. 3. c. 36. and 13 Geo. 3. c. 33. to steal or destroy, *in the night*, any oak, beech, ash, elm, fir, chestnut, asp, poplar, alder, maple, larch, or hornbeam, *timber trees*, is transportation for seven years. 215 f. 5
- 12 By 6 Geo. 3. c. 48. to destroy any timber tree, or any tree likely to become timber, or the tops or tops thereof, incurs a penalty of 20*l.* with costs and charges, for the first offence; 30*l.* for the second; and for the third, transportation. 215, 216
- 13 The costs and charges must be definitely ascertained in the conviction, or it may be quashed. 216 (N)
- 14 *Qu.* whether the justices of peace have not a power to transport for the third offence. *ibid.*
- 15 By 6 Geo. 3. c. 48. to go into the grounds of another, and cut or spoil any sticks of wood, or green stubbs, &c. or to have the same in custody unsatisfactorily, incurs a penalty of, 1*st*, 40*s.* 2*dlly*, 5*l.* and 3*dlly*, the offender shall be deemed an incorrigible rogue. 216, 217
- 16 To obstruct the apprehending an offender forfeits 10*l.* 217
- 17 By 9 Geo. 3. c. 41. the clause No. 15, is extended to his majesty's forests and chaces. *ibid.* f. 9.
- 18 By 4 Geo. 3. c. 31. keepers may seize the implements for destroying such green stubbs, &c. to their own use. *ibid.*
- 19 By 29 Geo. 2. c. 36. to destroy trees in waste grounds, incurs the punishment of 6 Geo. 1. c. 16. (*Vide supra*, No. 10.) f. 10
- 20 By 9 Geo. 1. c. 22. to destroy trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit; or to rescue an offender; or to induce any other to join in such offence, is felony without clergy. *Page* 215 f. 2
- 21 By 13 Ed. 1. st. 2. no tree shall stand within a certain distance of the highway, which is likely to become a concealment or harbour for robbers. 382 f. 26
- 22 Trees whose branches incommode the highway, may be lopped by any person, if the owner neglects. 405
- 23 By 13 Geo. 3. c. 78. the owners of trees near the highways, except trees planted for ornament or shelter, &c. are made liable to a penalty for not cutting them. 405, 406
- 24 In what cases surveyors may cut down trees standing in any highway. 407

TRESPASS.

- 1 In what cases trespassers on the Northern borders are guilty of felony. 200, 201
- 2 How far the alteration of a man's property will make him liable to a trespass for re-taking it. 139
- 3 Force is implied in every trespass. 160

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Affrys.—Park.*

TRIAL.—*Vide Murder. Piracy. Record. Jury.*

TRINITY.

- 1 By 9 & 10 W. 3. c. 32. if any christian shall deny any one of the persons of the holy Trinity to be God; or maintain there are more gods than one; or deny the truth of christianity, or the divine authority of the holy scriptures, he shall be disabled to sue, &c. or bear any offices, &c. and be imprisoned three years. 7
- 2 Those who deny the Trinity are denied the benefit of the toleration act. 47

TRUST.

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- 1 How far a trust estate is liable to be seized for recusancy. Page 22
- 2 Lands settled in trust for the repair of the highways in what manner, and under whose directions they are to be managed and employed. 381, 382
- 3 By 1 W. & M. c. 26. if the trustee, &c. of any avoidance whereof the trust shall be for a papist shall present without giving notice to the university he shall forfeit 100*l.* 33, 34
- 4 By 12 Ann. c. 14. no trustee to a papist shall present to any benefice, &c. or the universities shall present. 44, 45
- 5 By 11 Geo. 2. c. 17, every grant of a benefice, &c. by a trustee to a papist is void, unless granted for a valuable consideration to a protestant purchaser, who shall discover, &c. as a popish trustee. *ibid.*

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- 1 In perjury it is not material whether the fact which is sworn, be in itself true or false, it is sufficient that the swearer did not know it to be true. 322, 323
- 2 It is no justification of a libel that the contents of it are true. 353
- 3 The reason why in a libel truth is no justification. 353, 354 (N)

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- 1 It is larceny to steal them. 144

T U R N I P S.

- 1 Not larceny at common law to steal them growing. 141
- 2 By 13 Geo. 3. c. 32. to steal or destroy turnips growing, incurs a penalty of 1*l.* &c. 217

T U R N P I K E G A T E S.

- 1 By 1 Geo. 2. c. 19. to destroy any public turnpike gate, or the rails or

fences thereto belonging, subjects the offender to hard labour for three months, and to be publicly whipped.

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- 2 By 5 Geo. 2. c. 33. on conviction at the assizes, the offender may be transported for seven years—and if he commit the offence a second time, or shall demolish any *turnpike house*, he shall be guilty of felony. 193 f. 5
- 3 In both cases the prosecution must be within six months. *ibid.*
- 4 If such convict return from transportation it is death. f. 6
- 5 By 8 Geo. 2. c. 20. whoever shall be guilty of the above offences, or destroy any chain, &c. placed to prevent persons from passing without paying toll, or shall rescue any offender, he shall suffer death without clergy. f. 7
- 6 By 13 Geo. 3. c. 84. if any person shall commit any of the offences aforesaid; or shall destroy any crane or machine for weighing carriages, &c. he shall be transported for 7 years, or committed to prison not exceeding three years at the discretion of the court. f. 8
- 7 In all the cases above mentioned the hundred shall make satisfaction. *ibid.*

T U R N P I K E R O A D S.

- 1 They are under the direction of TRUSTEES. *ibid.*
- 2 Who must possess *realty* of 40*l.* a year, or 800*l.* *personally*, or be heir apparent to *realty* of 80*l.* a year. 424
- 3 And take the oaths directed by 13 Geo. 3. c. 84. before two justices. *ibid.*
- 4 Or they are liable to a penalty of 50*l.* *ibid.*
- 5 And it is incumbent on the trustee to prove his qualification. *ibid.*
- 6 No publican shall be a trustee, or act under them. f. 2
- 7 But a publican may farm the tolls. *ibid.*
- 8 Acting as a trustee is evidence of being one. *ibid.*
- 9 Where

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- 9 Where the day of meeting has elapsed any five trustees may appoint a meeting of the whole body, on giving 20 days notice. *Page 425*
- 10 No meeting shall be adjourned longer than three months, and all business done between ten in the morning and two P. M. *f. 4*
- 11 If they exceed their power in erecting gates, the justices may order the gates to be removed. *f. 5*
- 12 Trustees may administer oaths. *f. 6*
- 13 Seven trustees may farm out the tolls by auction, upon one month's notice for that purpose, and describing the particular tolls to be let, and specifying their produce the preceding year. *426*
- 14 The method in which the bidding at such auction shall be conducted. *f. 8*
- 15 If the farmer of the tolls shall take more than the regular rates, he shall forfeit 5*l.* and gate keepers so doing shall forfeit 40*s.* *f. 9*
- 16 But seven trustees, upon a month's notice, may reduce or advance the tolls as they shall see convenient. *f. 10*
- 17 If the toll is mortgaged, then such an alteration requires the consent of four-fifths of the creditors. *427*
- 18 Five trustees may direct prosecution for nuisances, at the expence of the road, provided they can prove the fact. *f. 11*
- 19 Two trustees may supply the vacancy of toll keeper. *f. 12*
- 20 The trustees may agree for proportion of repairs with those who are bound by reason of tenure, inclosure, &c. *f. 13*
- 21 They shall hang up tables of the rates of toll, and of the different weights, and number of horses which carriages are allowed to carry or be drawn with. *f. 14*
- 22 They shall erect mile-stones, direction posts, flood posts, &c. &c. (*vide p. 396.*) *f. 15*
- 23 WEIGHING ENGINES. *428 f. 16*
- 24 Five trustees may order weighing engines to be erected at as many gates within their jurisdiction as they shall see proper. *ibid.*
- 25 No side gate to be erected unless by a majority of nine trustees, on 21 days notice, and no toll for passing only 100 yards through the same, unless over some expensive bridge. *Page 428*
- 26 The different burthens which carriages are allowed. *429*
- 27 The additional toll which those carriages are to pay for extra weight. *f. 18*
- 28 Any trustee, officer, or creditor may cause carriages, not passed above 300 yards through any gate, to return and be weighed upon tendering the driver 1*s.* which shall be refunded if the weight is found excessive. *430*
- 29 If the toll keeper neglects to weigh *suspected* carriages, or to receive the additional toll, he shall forfeit 5*l.* *f. 20*
- 30 The trustees shall make places within 300 yards of every gate for carriages to turn. *ibid.*
- 31 A list of the trustees, clerk, treasurer, and surveyor shall be hung in the house of every gate where there is a weighing engine to be inspected by drivers. *ibid.*
- 32 If the driver refuses to return, he forfeits 40*s.* and any peace officer may drive the carriage back to be weighed. *ibid.*
- 33 No carriage employed in husbandry or in carrying manure shall be weighed. *f. 21*
- 34 The quarter-sessions, upon complaint, may order weighing engines to be erected. *f. 22*
- 35 Where two roads meet, the trustees may agree to erect one weighing engine for the accommodation of both. *431 f. 23*
- 36 No composition to be made for tolls, unless the carriages have fellies six inches broad. *f. 24*
- 37 The penalty for endeavouring to evade the tolls by unloading goods, &c. before the carriage arrives at the weighing onquiro. *f. 25*
- 38 The penalty for endeavouring to avoid the weighing engine. *f. 26*
- 39 AS TO CARRIAGES. *432 f. 27*
- 3 C *40 The*

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- 40 The number of horses with which carriages are allowed to be drawn according to the breadths of their fellies and the penalties. *Page 432 f. 27*
- 41 Two oxen equal to one horse. *ibid. 4.*
- 42 Carriages to have names and descriptions. *5*
- 43 Carriage rolling 16 inches may be drawn with any number of horses and shall only pay half tolls. *f. 28*
- 44 No prosecution for penalties unless information be made of the offence within three days. *f. 29*
- 45 The penalty for taking off horses or altering the distance of the wheels to avoid the toll. *433*
- 46 The trustees may allow a sufficient number of horses up hills, rising more than four inches in a yard. *f. 31*
- 47 A justice on the oath of one witness may stop prosecution for penalties in drawing with a greater number of horses than are allowed, if it appear necessary by reason of deep snow, &c. (*vide p. 411.*) *ibid.*
- 48 Posts to be placed where additional horses are allowed. *ibid.*
- 49 No carriages with less than nine inch fellies shall be drawn by horses in pairs, except such as having six inch fellies shall be permitted by seven trustees, and except carriages drawn by two horses only. *434*
- 50 Justices in Wales may licence an increased number of horses. *f. 33*
- 51 Any person may apprehend the driver of a carriage not marked or drawn by a greater number of horses, &c. *f. 34*
- 52 Extraordinary high tolls for particular roads may be reduced. *f. 35*
- 53 EXEMPTION FROM TOLL. *434 f. 35*
- 54 Carriages rolling 16 inches only to pay half the toll of carriages with fellies of six inches. *ibid.*
- 55 No chaise marine, coach, landau, berlin, chaise, chair, calash, or hearse, nor any royal artillery or ammunition carriage, nor any cart drawn by one horse or two oxen.
- 56 Nor any carriage of nine inch fellies carrying one block of stone, or piece of timber shall be subject to the above tolls. *Page 434 f. 37*
- 57 Persons taking fraudulent advantage of these exemptions, shall forfeit between 5 *l.* and 40 *s.* *f. 38*
- 58 No toll shall be taken for any horses of soldiers or officers on their march or no duty, nor for any baggage wagons, nor shall such carriages be weighed at any engine. *f. 39*
- 59 But no exemption shall be taken by carriages carrying *any particular* kind of goods, unless they have fellies of six inches, and except carriages carrying corn, or grain in straw, hay, straw, fodder, manure, dung or lime. *f. 40*
- 60 And no exemption shall be taken by carriages of six inch fellies, unless the tire of such fellies lie flat; and those only which shall not deviate more than one inch from a flat surface shall be taken to be flat. *436*
- 61 No toll shall be taken for carriages working the repair of highways or turnpike roads. *f. 42*
- 62 The MAIL COACHES are exempted from toll. *f. 43*
- 63 As to STATUTE DUTY. *436 f. 44*
- 64 The surveyors shall see that the duty required by the several particular turnpike acts is done, and that the compositions arising therefrom are applied to the repair of the respective roads on penalty of 40 *s.* *ibid.*
- 65 When two trust roads lie in the same parish, and the duty shall exceed three days, the justices shall apportion the shares of duty to be borne by each parish. *ibid.*
- 66 MATERIALS FOR REPAIRS. *f. 45*
- 67 No surveyor shall gather horses without the consent of the owners of the land, or licence from a justice, after such owner shall have been summoned and refused to appear. *437*
- 68 Satisfaction shall be made for materials. (398) *ibid. f. 46*
- Materials may be contracted for, but no surveyor shall have any share therein (p. 405.) *f. 47*
- 69 NUISANCES. *437 f. 48*

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- 70 If the overseer of any turnpike road shall suffer any *nuisance* (as described) to remain for four days within ten feet, on either side of the middle of such road, he shall forfeit 40 s. *Page 437*
f. 48
- 71 SUBSCRIBERS and MORTGAGERS.
f. 49
- 72 Subscribers who shall sign any writing, to advance money, shall be bound by their subscription, and on default, the treasurer, on notice, may sue for the same. *ibid.*
- 73 Mortgagees of the tolls shall account, on oath, for all the monies which shall so come to their hands, after fourteen days notice from five trustees, for that purpose, or forfeit 10 l. 429
f. 50
- 74 The penalty for a mortgagee holding over, after his money is repaid. f. 51
- 75 OFFICERS OF TURNPIKE ROADS.
f. 52
- 76 If a discharged gatekeeper refuses to deliver up the toll-house, &c. within four days after notice of the new appointment, any justice may order him to be removed, and put the new toll-keeper in possession. *ibid.*
- 77 Gate-keepers and toll-gatherers, on notice for that purpose, from any five trustees, shall account for all the monies they have received upon penalty of 5 l. 430
- 78 No person residing in any toll-house shall be removeable as a *pauper*, unless chargeable; nor shall he thereby gain a settlement, or be assessed to any public or parochial levy. f. 54
- 79 Gate-keepers permitting horses or carriages, otherwise than as allowed, or without the names, inscriptions, &c. thereon, shall forfeit 40 s. f. 55
- 80 All officers, their executors and administrators shall, within ten days after notice by five trustees, deliver up all books, &c. &c. upon pain of 20 l. f. 56
- 81 Treasurers and surveyors shall give bond for the faithful discharge of their duty; but the exemption of such bonds from stamps is repealed. f. 57
- 82 Officers who shall neglect to put this act (13 Geo. 3. c. 84.) into execution, shall forfeit 10 l. P. 440 f. 58
- 83 Justices may act notwithstanding they are creditors. f. 59
- 84 Punishment of such as shall resist or make forcible opposition to any thing directed by this act. f. 60
- 85 REPAIRING ALTERED ROADS. 440
f. 61
- 86 The inhabitants or persons who were liable to repair any old road, shall continue liable to repair any new road which may be made in lieu of the old one. *ibid.*
- 87 If the parties cannot agree in what proportion they are liable to repair, it shall be settled by two justices. 441
- 88 And for which proportion a gross or annual sum may be fixed to be paid with the consent of the parties, at a vestry for that purpose. *ibid.*
- 89 Where turnpike roads are indicted, the court may settle the proportion of the fine and the costs between the inhabitants and the trustees f. 62
- 90 But not so as to endanger the security of the creditors. *ibid.*
- 91 How far the powers of the HIGHWAY ACT may be adopted with respect to TURNPIKE ROADS. f. 63
- 92 In what cases the highway and turnpike acts are similar. 442 f. 64
- 93 Informations for penalties, in order to favour an offender, are fraudulent and void. f. 60

U. V.

VACATING RECORDS.—*Vide Records.*

VAGABONDS.—*Vide Vagrants, No. 3, 4, 5, 11, &c.*

VAGRANTS.

BY 17 Geo. 2. c. 5. all who threaten to abandon their family to the parish, or who return after removal

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- removal without certificate, or who refuse to work, or beg within their parishes, are IDLE AND DISORDERLY PERSONS. *Page 569, 570*
- 2 Such offenders may be committed for a month. *570*
 - 3 Any person may apprehend such beggars, and if they escape they shall be punished as rogues and vagabonds. *f. 3*
 - 4 Patent gatherers, bearwards, players, minstrels, jugglers, gypsies, fortune-tellers, gamblers, abconders, unlicensed pedlars, wanderers, and beggars, shall be deemed ROGUES AND VAGABONDS. *ibid. f. 4*
 - 5 Also by 23 Geo. 3. c. 88. whoever shall be apprehended with any instrument, engine, utensil, or other offensive weapon, with intent to commit robbery, or house-breaking, shall be deemed a ROGUE AND VAGABOND. *148, 165*
 - 6 By 17 Geo. 2. c. 5. convicted end gatherers, and rogues and vagabonds, who are refractory, or have escaped, or shall become rogues and vagabonds a second time, shall be deemed INCORRIGIBLE ROGUES. *571*
 - 7 Any person may apprehend an offender, but if charged so to do by a justice, he *must*, or forfeit 10*s.* *ibid. f. 6*
 - 8 Two justices in each district shall meet four times a year, in order to direct a *privy search* within his jurisdiction. *ibid. f. 7*
 - 9 The justice shall enquire, as well of the person apprehended as of others, the last place of legal settlement, and to commit the examination to the quarter sessions. *571 f. 8*
 - 10 The vagrant shall be publicly whipped and committed, or be conveyed by a *pais*, &c. a duplicate of which shall be filed at the sessions. *ibid.*
 - 11 If the session shall adjudge a vagrant so committed, a rogue and vagabond, or incorrigible rogue, they may send him to hard labour for six months, and such incorrigible rogue for any further time less than two years. *572*
 - 12 If above twelve years of age; and a male, they may send him to sea, &c. *Page 572*
 - 13 If such incorrigible rogue shall break gaol, or shall offend a second time, he shall be transported for seven years. *ibid.*
 - 14 By 13 & 14 Car. 1. c. 22. the sessions may transport such vagrants as shall be adjudged incorrigible. *572 f. 10*
 - 15 By 17 Geo. 2. c. 5. if any child, above seven years of age, of any vagrant, should be committed, the sessions may place it out as an apprentice; and if the vagrant be found wandering with the same child, he or she shall be an incorrigible rogue. *572 f. 11*
 - 16 Convicted vagrants, who cannot be conveyed, &c. may be placed out as servants, &c. *f. 12*
 - 17 The justices shall express, in a certificate to be given to the officer with the pass, the particular manner in which the vagrant shall be conveyed. *f. 13*
 - 18 The manner in which vagrants shall be passed from one place to another, till they reach their destination. *573*
 - 19 Vagrants may be searched and their property appropriated to defray the expence of their conveyance. *573 f. 18*
 - 20 The duty of the constables, &c. in respect to the conveying of vagrants. *f. 16*
 - 21 By 25 Geo. 2. c. 34. if the high constable is deficient in funds to discharge the expence of conveyance, it shall be paid by the treasurer. *573, 574*
 - 22 By 17 Geo. 2. c. 5. to alter the certificate, (*vide supra No. 17.*) incurs a penalty of 5*0*l.** and not to deliver or receive a vagrant, incurs, pursuant to the directions of it, 2*0*l.** *ibid. f. 18*
 - 23 The parish to which a vagrant is conveyed shall set him to work, and on refusing, he shall be committed by a justice to hard labour. *f. 19*
 - 24 The

A TABLE OF PRINCIPAL MATTERS.

24 The vagrant may be re-examined by a justice of the parish to which he is conveyed, and committed as *incorrigible*.—But no vagrant shall be removed but by *two* justices. Page 573,

574 f. 20

25 But it has been decided, that the parish to which a vagrant is *thus* sent by a pass, cannot appeal from it to the justices.—*R. v. Ringwold*. 574

(N)

26 The manner by which *Scottish* vagrants, shall be passed to the place of their last legal settlement. 574 f. 21

27 And if any such vagrant be afterwards found wandering, he shall be deemed incorrigible. 574

28 How *Irish* vagrants shall be conveyed to their native kingdom. 575

29 The authority of justices to secure and convey lunatic vagrants, &c. 2 & 575 f. 23

30 Whoever shall harbour a vagrant, without giving notice to the constable, shall forfeit from 10s. to 40s. 576

f. 24

31 Any female vagrant delivered of a child, chargeable to the parish, may be detained by the officers, conveyed before a justice, examined, committed till the sessions, and then confined for six months, &c. *ibid.* f. 25

32 The justices shall order the parish to be reimbursed. *ibid.*

33 If the child be a *bastard*, it shall not gain settlement by its birth, but the settlement of the mother shall be that of the child.

34 The charges of apprehending, &c. &c. to be paid out of the county rate. *i id.* (N)

35 To neglect any of the directions of this act, incurs a penalty from 20s. to 5*l.* *ibid.*

VALUE.—*Vide Robbery. Larceny.*

VEGETABLES.

1 By 13 Geo. 3. c. 32. to steal or destroy any turnips, potatoes, cabbages,

parsnips, peas, or carrots, growing, incurs a penalty of 10s. Page 217

V E N U E.

1 In an information for usury, *the place* where the corrupt bargain was made must be expressly set forth. 533

2 Usury in one county pleaded in bar to a bond in another county, shall be tried where the usury is alleged. *ibid.*

3 An offence which consists in *nonfeasance*, need not be alleged in any certain place. 20

V E R D I C T.

1 Where impossible matter, found in a verdict, shall be rejected. 116 f. 9

V I C T U A L S and V I C T U A L L E R.

1 An insurrection to bring down the price of victuals, *is said* to be a *constructive* levying of war against the king, and may be laid as an overt act of high treason in compassing his death, *qu.* 54

2 *Merchant strangers* may sell imported victuals in the gross. 479

3 By 23 Edw. 3. c. 6. all dealers in any kind of victuals shall sell for reasonable profits, and the chief officers of towns shall see they do so on pain of treble value of the thing exorbitantly sold. 480

4 How butchers selling unwholesome meat shall be punished. *ibid.*

5 By 4 Hen. 7. c. 3. no beasts shall be killed in walled towns. *ibid.*

6 By 21 Hen. 8. c. 8. calves shall be killed at certain times only. *ibid.*

7 By 1 Jac. 1. c. 22. no calves shall be killed under five weeks old. *ibid.*

8 By 22 Hen. 8. c. 6. butchers shall not keep tan houses. *ibid.*

9 Whether they may sell to one and ther. *ibid.*

10 *Aliens amio* may dispose of their victuals. f. 7 & 8

11 By

A. TABLE OF PRINCIPAL MATTERS.

21 By 25 Hen. 8. c. 2. the lord chancellor, &c. may set the prices upon victuals. *Page 481*

22 This shall not restrain officers of cities, &c. having authority to set the prices of victuals. *ibid.*

23 By 3 & 3 Edw. 6. c. 15. if any butchers, brewers, bakers, poulterers, cooks, costers, or fruiterers shall conspire to raise the price of victuals, &c. they shall forfeit, &c. *ibid.*

24 By 2 Geo. 3. c. 14. no brewer, innkeeper, victualler, shall be sued for advancing the price of strong beer and ale in a reasonable degree. 482

*Vide Engrossing, Corn, Bread, Beer, But-
ter, Cheese, Cattle, Fish, Bacon,
Hay, Fruit, Honey.*

V I E T A R M I S.

1 The words *vi et armis* shall be im-
plied in an indictment for forcible
entry *vi et armis*. 287 f. 44

2 An indictment for stopping a high-
way in a man's own ground is good
without the words *vi et armis*. 422
f. 92

3 In *scire facias* on a recognizance for
the peace *contra pacem* are sufficient
without *vi et armis*. 258 f. 19

VIEW.—*Vide Highways, No. 153 Pub-
lic Houses, Riots, Travellers.*

V I L L E I N.

1 It was no felony, by the common
law to steal a *villain*. 142

VILLAINOUS JUDGMENT.

1 It is a punishment inflicted by the
common law. 351 f. 9

2 It was formerly inflicted for conspi-
racv. *ibid.*

3 It is now obsolete; no instance of it
since Edw. 3d. *Page 351*

VIOLATION.—*Vide Trespass. Murder.*

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1 The punishment for stealing it. 214

UNIVERSITIES.—*Vide Papists. Pub-
lic Houses. Preachers. Books.*

UNLICENSED HOUSE.—*Vide Pub-
lic Houses. Bawdy Houses.*

1 Houses of public entertainment within
20 miles of London, deemed disor-
derly, unless licensed. 358

2 The form of the licence. *ibid.* f. 3

3 Houses so licensed, to be distinguish-
ed by an inscription. *ibid.* f. 4

4 How offenders may be punished. 359

U S U R Y.

1 Is a contract upon a loan of money.
to give the lender a certain profit for
the use of it at all events. 527 f. 1

2 Or in a larger sense, it is all undue
advantages taken by a lender against
a borrower. f. 2

3 But an agreement to pay double the
sum borrowed, on non-payment of
the principal on a certain day is not
usurious, for the borrower may dis-
charge himself by performing it. f. 3

4 The ancient notion of usury. f. 4 to 7

5 By 12 Ann. c. 16. no person upon
any contract shall take more than 5
per cent. for any loan; and all bonds,
contracts, and assurances for the re-
payment of the principal, &c. shall
be void. f. 8

6 Though

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- 6 Though the reservation be of so much "if requested" and the request be never made. *Page 527 f. 8. in notes*
- 7 And whoever upon any contract shall take, by way of corrupt loan, or interest by any deceitful way above the rate of *5 per cent. per ann.* shall forfeit treble the value. *529*
- 8 *Note.* The treble value is not forfeited unless more than the legal rate be taken; but the very contract alone avoids the security. *ibid. (N) 1*
- 9 By 12 Ann. whoever shall take for brokerage more than *5 s.* for procuring the loan of 100*l.* &c. shall forfeit 20*l.* *f. 9*
- 10 A contract made before the statute is not within it. *f. 10*
- 11 A bond for a just debt with lawful interest shall not be affected by a corrupt agreement between the obligors to which the obligee is not privy. *f. 11*
- 12 But a bill of exchange given on an usurious contract is void in the hands of an innocent indorsee even without notice of the usury. *530 (N) 2*
- 13 A subsequent usury made upon a precedent contract, subjects the party to the treble value, but does not avoid the fair security. *f. 12*
- 14 Yet *quære* if the party take more than legal interest. *(N)*
- 15 The computation of interest shall be by calendar and not by lunar months. *f. 13*
- 16 But interest paid before it is due will not make the party liable to treble value unless it be corrupt. *f. 14*
- 17 An annuity above the legal rate of interest is not usurious except it be a colour for usury. *f. 15*
- 18 No contract is usurious by which the lender runs the hazard of losing all his money, both principal and interest. *f. 16*
- 19 But if the interest only be hazarded, and the principal secure, the whole may be usurious. *ibid.*
- 20 So a loan upon a contingency, where the party may receive above *5 per cent.* without the risk of receiving less is, within the statute 12 Ann. *ibid.*
- 21 If the contingency goes to affect the interest only, it is usurious. *Page 530 (N) 3*
- 22 If the contingency relates to both principal and interest, and above *5 per cent.* be taken, the court will enquire whether it be colourable or not. *ibid.*
- 23 But where above *5 per cent.* obtained by means of exchanging goods, if a credit is given for them, it is not usury. *ibid.*
- 24 Unless it is a colourable scheme, for it is the intent which shall determine whether it be a loan or risk. *ibid.*
- 25 And where above *5 per cent.* is taken, if the substance of the contract be a borrowing and a lending, a slight colourable contingency only will not take it out of the statute. *ibid.*
- 26 Usury shall not be imputed from any mistake in drawing up the agreement. *f. 17*
- 27 No expectation of more than legal interest, if there be no kind of agreement relating to it, shall be construed usurious. *532 f. 18*
- 28 Nor is the reservation of more than *5 per cent.* upon the non-payment of the principal, at the end of the year usurious—unless it appears there was an agreement that the principal should not then be paid. *f. 19*
- 29 If the usurious transaction is for a loan of money, &c. &c., no shift or colour whatever shall evade the statute. *(N) 4*
- 30 If a man borrows under colour of buying, it may be usurious. *ibid.*
- 31 But if goods are sold, to be paid for in three months, or to allow the seller such an additional profit as exceeds *5 per cent.* it is not usury. *ibid.*
- 32 A fine levied or judgment suffered may be avoided by an averment of a corrupt agreement, as well as any special or parol contract. *f. 20*
- 33 And in assumpsit if it appear usurious, the plaintiff cannot recover—but to a specialty the usury must be pleaded. *ibid.*
- 34 The court may direct an issue to try the usury. *(N)*

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- 35 It is not necessary that the principal and interest should be secured by the same writing. *Page* 532 f. 21
- 36 Nor is it necessary that the usury be in the name of interest. 533 f. 22
- 37 A second bond given for the amount of a forfeited penalty on a former bond is usurious. f. 23
- 38 In pleading usury in bar to an action the whole must be specially set forth—but in an *information* on the statute the corrupt bargain may be stated generally. f. 24
- 39 And in such information, the place where, and the time when the bargain was made, must be expressly alleged and *exactly* proved. f. 25 (N) 2
- 40 Where usury is pleaded in bar to a bond, the trial shall be where the usury is alleged, f. 26
- 41 The party who hath agreed to pay money upon an usurious contract is not an admissible evidence, unless he have paid off the whole debt. f. 27
- 42 But he is a good witness to prove the repayment of the money borrowed. *ibid.* (N)
- 43 And the borrower may be a witness, though the money is not repaid, if the usury neither affects the debt, or avoids the contract. *ibid.*
- 44 And where the matter is doubtful the objection shall only go to the credit, and not to the competency. *ibid.*
- 45 If the borrower of money, upon an usurious contract, bring an action of trover for goods pledged as a security for the repayment of the principal, the parties are considered *in pari delicto*, and the plaintiff shall be nonsuited. 533 (N)
- 46 The principal money may never be paid, and yet the usury may be committed. 362
- 47 An information for usury on a loan of money, cannot be supported by evidence of usury concerning *wares sold*. 534 f. 28
- 48 What may be pleaded in usury. *ibid.* (N)
- 49 What may be answered to a bill of discovery. *Page*
- 50 By 3 Geo. 1. c. 8. the bank of England may borrow money at more than 5 per cent. *per annum*. f. 29
- 51 By 14 Geo. 3. c. 70. monies lent on *West India* estates may be at 6 per cent. *per annum*. f. 30
- 52 If a bill of exchange drawn on account of an usurious contract be exchanged for a bond, and an action be brought on such bond, to which the defendant pleads usury, no indorser of the bill of exchange is a competent witness to prove the usury—*Sutton v. Shelly*, Term Rep. 296

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- 1 By 26 Hen. 8. c. 6. a murder in Wales may, *an indictment*, be tried in the adjoining English county. P. 121
- 2 Which shall be considered as the next adjoining English county. 220, 221

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- 1 A previous denunciation of war, not necessary to make adherence to the king's enemies, high treason. 55
- (N) 6

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- 1 Killing an officer whose warrant gives him no authority to make *the arrest*, is only manslaughter. 130
- 2 So also where a good warrant is executed in an unlawful manner. *ibid.*
- 3 In what cases homicide by an officer endeavouring to execute a warrant is justifiable. 106, 107
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- 2 They were anciently punished as *heretics*, by the writ *de heretico comburendo*, &c. *ibid.*
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- 4 The offenders divided into four kinds by 1 Jac. 1. c. 12. *ibid.*
- 5 The punishment inflicted by that act. 9
- 6 By 9 Gen. 2. c. 5. no proceedings shall be had against any person for witchcraft, sorcery, enchantment, or conjuration, &c. *ibid.*
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- 8 By 17 Geo. 1 c. 5. all jugglers, fortune-tellers, and dealers in crafty, occult science, shall be deemed rogues and vagabonds. *ibid.*

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